

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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

No. C 14-5578 MEJ (PR)

JAMES DARREN CRAWFORD,

Plaintiff,

v.

JEFFREY BEARD, et al.,

Defendants.

**ORDER OF PARTIAL SERVICE;  
DISMISSING CERTAIN CLAIMS  
WITH LEAVE TO AMEND;  
DENYING MOTION TO APPOINT  
COUNSEL**

Docket No. 10

**INTRODUCTION**

Plaintiff, a California state prisoner currently incarcerated at Calipatria State Prison and proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983, complaining of civil rights violations at Pelican Bay State Prison (“PBSP”), where he was previously housed. Plaintiff’s amended complaint (Docket No. 11) is currently before the Court for review pursuant to 28 U.S.C. § 1915A. Also pending before the Court is Plaintiff’s motion to appoint counsel (Docket No. 10).

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings must be liberally construed. Balistreri v.

1 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

2 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of  
3 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Specific  
4 facts are not necessary; the statement need only “give the defendant fair notice of what the .  
5 . . claim is and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007)  
6 (citations omitted). Although a complaint “does not need detailed factual allegations [in  
7 order to state a complaint], . . . a plaintiff’s obligation to provide the grounds of his  
8 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation  
9 of the elements of a cause of action will not do. . . . Factual allegations must be enough to  
10 raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S.  
11 544, 555 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim  
12 for relief that is plausible on its face.” Id. at 570.

13 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
14 elements: (1) that a right secured by the Constitution or laws of the United States was  
15 violated, and (2) that the alleged deprivation was committed by a person acting under the  
16 color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

17 **B. Amended Complaint**

18 The amended complaint completely replaces the prior complaint. Ferdik v. Bonzelet,  
19 963 F.2d 1258, 1262 (9th Cir. 1992). In his amended complaint, Plaintiff claims that PBSP  
20 prison officials violated his rights under the First and Fourteenth Amendments by  
21 withholding and confiscating his incoming and outgoing mail, and by denying his grievances  
22 related to the withholding and confiscation of his mail. Plaintiff sets forth six categories of  
23 claims, which the Court addresses in turns below.

24 **1. Legal Claims**

25 **a. First Amendment Right to Send Mail**

26 Plaintiff lists three instances in which he alleges that PBSP staff and officials violated  
27  
28

1 his First Amendment right to free speech by failing to send out his mail.<sup>12</sup>

2 According to the amended complaint, Plaintiff is considered a human rights activist  
3 and jailhouse lawyer. He often publishes writings that are critical of prison officials and of  
4 the policies of the California Department of Corrections and Rehabilitations (“CDCR”). See  
5 Docket No. 11 at 13. Plaintiff alleges that, in retaliation for his activism and writings, he has  
6 been subjected to threats, racist comments, and destruction of his property. See id.

7 Plaintiff states that PBSP processes outgoing mail as follows: Prisoners submit their  
8 mail to a correctional officer in his assigned housing unit. The correctional officer forwards  
9 it to the Institutional Gang Investigations unit (“IGI”) for screening. If the mail is not  
10 disallowed, IGI forwards the mail to the PBSP mailroom for delivery to the United States  
11 Postal Service. Money is removed from the prisoner’s trust account to pay for the price of  
12 postage. If the mail is disallowed, the prisoner receives a stopped mail notification (CDCR  
13 Form 1819). See Docket No. 11 at 14–15.

14 On November 24 and December 5, 2013, and on January 2, 2014, Plaintiff sent mail to  
15 Mary Ratcliff. See Docket No. 11 at 15–23. The mailings included copies of articles  
16 authored by Plaintiff that criticized CDCR policies and practices. See id. Ratcliff never  
17 received the mailings. See id. Plaintiff never received a stopped mail notification, nor was  
18 his trust account debited for postage. See id. Plaintiff concludes that his mail never left  
19 PBSP, and was instead deliberately and unlawfully confiscated by Officer Burriss, the IGI  
20 officer assigned to review his mail. See id. at 16–17. Plaintiff alleges that Sergeant Countess  
21 and Lieutenant Frisk are also liable for this alleged First Amendment violation because they  
22 failed to adequately supervise their subordinate, Officer Burriss, who was under their direct  
23 supervision. See id. at 37, 39, and 40.

---

25 <sup>1</sup>These three instances are the basis for his first, second, and third causes of action. See  
26 Docket No. 11 at 45–49.

27 <sup>2</sup>Plaintiff also discusses a fourth instance where prison officials delayed sending out his  
28 November 2013 mailings to Penny Schoner and Anthony Rayson. Docket No. 11 at 35–41.  
However, he does not allege that the delayed sending of these pieces of mail violated his First  
Amendment right to free speech; rather, he challenges the cancellation of the related grievance  
in his eleventh cause of action.

1 Prisoners enjoy a First Amendment right to send and receive mail. See Witherow v.  
2 Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407  
3 (1989)). A prison may adopt regulations or practices which impinge on a prisoner’s First  
4 Amendment rights as long as the regulations are “reasonably related to legitimate penological  
5 interests.” See Turner v. Safley, 482 U.S. 78, 89 (1987). Plaintiff’s allegations, when  
6 liberally construed, can plausibly support an inference that Defendant Burris confiscated or  
7 destroyed Plaintiff’s mail without justification in violation of his First Amendment right to  
8 send mail. See Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (courts “have an  
9 obligation where the petitioner is pro se, particularly in civil rights cases, to construe the  
10 pleadings liberally and to afford the petitioner the benefit of any doubt.”).

11 There is no respondeat superior liability under Section 1983, i.e. no liability under the  
12 theory that one is responsible for the actions or omissions of an employee. Taylor v. List,  
13 880 F.2d 1040, 1045 (9th Cir. 1989). In order to allege facts sufficient to show a  
14 jurisdictional basis for imposing liability, a plaintiff must allege facts to show that (1) the  
15 defendant proximately caused the deprivation of rights of which plaintiff complains, see  
16 Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981); (2) the defendant, in a  
17 supervisory capacity, failed to properly train or supervise personnel resulting in the alleged  
18 deprivation, Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th Cir.  
19 1984); (3) the alleged deprivation resulted from custom or policy for which defendant was  
20 responsible, see id.; or (4) the defendant knew of the alleged misconduct and failed to act to  
21 prevent future misconduct, Taylor, 880 F.2d at 1045. Liberally construed, the Court finds  
22 that Plaintiff states a cognizable claim against Defendants Countess and Frisk for their failure  
23 to properly train or supervise Burris, thereby proximately causing the First Amendment  
24 violation.

25 Plaintiff has also named Officers Yates and Nickell — the correctional officers to  
26 whom he submitted the mailings — as defendants. See Docket No. 11 at 1 and 6. However,  
27 Plaintiff has made no allegations linking either Officer Yates or Officer Nickell to any First  
28 Amendment violation. Nor did he name Officer Yates and Nickell in any of the causes of

1 actions. In fact, Plaintiff’s allegation that IGI received his mailings but deliberately chose  
2 not to forward them to the PBSP mailroom for delivery means that neither Officers Yates or  
3 Nickell delivered his mailings to IGI and did not interfere with the mailings. Officer Yates  
4 and Nickell are therefore DISMISSED from this action with prejudice.

5 **b. First Amendment Right to Receive Mail**

6 Plaintiff lists two instances in which he alleges that Defendants Hall, Patton and Frisk  
7 violated his First Amendment right to free speech by failing to deliver mail to him.<sup>3</sup>

8 In the first instance, Plaintiff never received a December 2013 mailing from Michael  
9 Roe. The Roe mailing was addressed to James Harvey (another inmate), but also listed  
10 Mutope Duguma, Plaintiff’s New African adopted name, and Plaintiff’s CDCR identification  
11 number. Docket No. 11 at 24. The mail was delivered to Harvey, who informed  
12 Correctional Officer Wahlbeck that it was intended for Plaintiff. See id. Officer Wahlbeck  
13 routed the mailing to Plaintiff. See id. Plaintiff never received the mailing. See id. The  
14 PBSP mailroom denied returning the mailing to Roe, and Roe states that the mailing was not  
15 returned to him. See id. at 25 and 29. Plaintiff concludes that unidentified Doe defendants  
16 intentionally removed his mailing for the re-route box “for illicit purposes.” See id. at 49.  
17 Plaintiff further alleges that Sergeant Hall intentionally misled him as to the whereabouts of  
18 his mailing from Michael Roe to cover up the illicit acts of the John Does, and failed to  
19 adequately supervise the correctional officers subordinate to him. See id. at 49–50.

20 In the second instance, on January 28, 2014, Defendant Frisk stopped a copy of the  
21 San Francisco Bay View Newspaper from reaching Plaintiff because a personal handwritten  
22 note to Plaintiff was concealed within the pages of the newspaper. Docket No. 11 at 31. The  
23 stop action was approved by Defendant Patton. See id. at 31. Plaintiff alleges that the note  
24 was from the editor and referred him to a specific article, and that these type of notes are not  
25 prohibited by CDCR regulations. See id. at 32.

26 As discussed *supra*, a prison may adopt regulations or practices which impinge on a  
27

---

28 <sup>3</sup>These two instances are the basis for his fourth and fifth causes of action. See Docket  
No. 11 at 49–51.

1 prisoner's First Amendment rights as long as the regulations are "reasonably related to  
2 legitimate penological interests." See Turner, 482 U.S. at 89. The Turner standard applies to  
3 regulations and practices concerning all correspondence between prisoners and to regulations  
4 concerning incoming mail received by prisoners from non-prisoners. See Thornburgh, 490  
5 U.S. at 413. Prison regulations requiring mail to inmates to include the inmate's committed  
6 name and identification number and a return address implicates an inmate's First Amendment  
7 rights. Morrison v. Hall, 261 F.3d 896, 906 (9th Cir. 2001). Liberally construed, the Court  
8 finds that Plaintiff has stated a cognizable claim against Defendants Frisk and Patton for a  
9 First Amendment violation of his right to receive mail.

10       However, Plaintiff has failed to state a cognizable claim against Sergeant Hall.  
11 Sergeant Hall is linked to the First Amendment violation by (1) misleading Plaintiff about the  
12 whereabouts of his mail from Michael Roe and (2) failing to supervise his subordinates. A  
13 person deprives another "of a constitutional right, within the meaning of section 1983, if he  
14 does an affirmative act, participates in another's affirmative acts, or omits to perform an act  
15 which he is legally required to do that causes the deprivation of which [the plaintiff  
16 complains]." Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (quoting Johnson v. Duffy,  
17 588 F.2d 740, 743 (9th Cir. 1978)). The inquiry into causation must be individualized and  
18 focus on the duties and responsibilities of each individual defendant whose acts or omissions  
19 are alleged to have caused a constitutional deprivation. Id. Plaintiff's allegations do not  
20 meet these standards, and therefore do not state claims for relief.

21       Plaintiff's conclusion that Sergeant Hall caused the First Amendment violation  
22 because, two weeks after the Roe mailing was re-routed, he misrepresented the location of  
23 the mailing is speculative. Factual allegations in a complaint must be enough to raise a right  
24 to relief above the speculative level." Bell Atlantic Corp., 550 U.S. at 555.

25       Similarly, Plaintiff's allegations regarding Sergeant Hall's supervisory liability are  
26 speculative and conclusory. As discussed *supra*, supervisory liability exists only where the  
27 defendant, in a supervisory capacity, failed to properly train or supervise personnel resulting  
28 in the alleged deprivation, Ybarra, 723 F.2d at 680; or the alleged deprivation resulted from

1 custom or policy for which defendant was responsible, see id.; or the defendant knew of the  
2 alleged misconduct and failed to act to prevent future misconduct, Taylor, 880 F.2d at 1045.  
3 Plaintiff does not explain how Sergeant Hall’s subordinates are involved in routing mail, or  
4 how Sergeant Hall’s failure to supervise resulted in the improper removal of Plaintiff’s mail  
5 from the re-route box. In addition, a single instance of Plaintiff’s re-routed mail disappearing  
6 or of Sergeant Hall misrepresenting facts fails to establish a custom or policy. Plaintiff’s  
7 claim against Sergeant Hall is DISMISSED with leave to amend to correct the identified  
8 deficiency, if he can truthfully do so. See Eldridge v. Block, 832 F.2d 1132, 1135–36 (9th  
9 Cir. 1987). If Plaintiff chooses to replead this claim against Sergeant Hall, he must plead  
10 factual content that allows the court to draw the reasonable inference that Sergeant Hall  
11 failed to adequately supervise his subordinates, and that this failure caused the First  
12 Amendment violation.

13 **c. First Amendment Retaliation**

14 Plaintiff sets forth three First Amendment retaliation claims, relying on the same facts  
15 used to support his First Amendment claims based on the right to send mail.<sup>4</sup> Plaintiff claims  
16 that Defendants Burris, Countess, and Frisk interfered with his mail in retaliation for  
17 Plaintiff’s engaging in protected speech with media outlets and political groups. Plaintiff  
18 notes that the mailings to Mary Ratcliff contained articles authored by Plaintiff that were  
19 critical of CDCR.

20 “Within the prison context, a viable claim of First Amendment retaliation entails five  
21 basic elements: (1) An assertion that a state actor took some adverse action against an inmate  
22 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the  
23 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably  
24 advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir.  
25 2005) (footnote omitted). The Court finds that, liberally construed, Plaintiff’s allegations  
26 regarding his outgoing mail to Mary Ratcliff sent on November 24, 2013, December 5, 2013,  
27

---

28 <sup>4</sup>These claims are his sixth, seventh, and eighth causes of action. See Docket No. 11 at 51–55.

1 and January 2, 2014, state cognizable retaliation claims.

2 **d. First Amendment Right to Access the Courts**

3 Plaintiff alleges that Defendants Bramucci, Bond, Ducart, Hodges, Allen and Zamora  
4 violated his First Amendment right to access to the courts when they cancelled his grievances  
5 challenging the above-referenced confiscation of the San Francisco Bay View, challenging  
6 the above-referenced return of his mailing from Michael Roe, and challenging the delay of  
7 outgoing mail sent by Plaintiff to Penny Schoner and Anthony Rayson.<sup>5</sup> Plaintiff contends  
8 that the cancellations denied him a meaningful review of his administrative appeals in that,  
9 among other things, prison officials did not follow regulations set for appeals.

10 Under the First Amendment, prisoners have the right to access the courts and the right  
11 to petition the government for a redress of grievances. See Bounds v. Smith, 430 U.S. 817,  
12 821 (1977). The right of meaningful access to the courts extends to established prison  
13 grievance procedures. Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) overturned on  
14 other grounds by Shaw v. Murphy, 532 U.S. 223, 230 n. 2 (2001)); accord Hines v. Gomez,  
15 853 F. Supp. 329, 331–32 (N.D. Cal. 1994). Liberally construed, Plaintiff’s allegations that  
16 Bramucci, Bond, Ducart, Hodges, Allen, and Zamora denied him a meaningful review of his  
17 administrative appeals states a First Amendment violation.

18 To the extent that Plaintiff is arguing that the cancellation of his grievances renders  
19 him unable to meet the exhaustion requirement of the Prison Litigation Reform Act  
20 (“PLRA”), that argument fails to state a claim for denial of access to the courts. To establish  
21 a violation of the right of access to the courts, a prisoner must establish that he has suffered  
22 an “actual injury” as a result of a prison official’s misconduct. See Lewis v. Casey, 518 US.  
23 343, 351–52 (1996). Plaintiff has not alleged in his amended complaint that his claims have  
24 been dismissed for failure to exhaust or that he has otherwise been unable to present his  
25 claims. See id. at 348.

26  
27  
28 <sup>5</sup>These claims are his ninth, tenth, and eleventh causes of action. See Docket No. 11 at 51–55.

1                   **e.       First Amendment Conspiracy**

2           Plaintiff claims that Defendants Williams, Love, Bell, Ducart, Hodges, and Zamora  
3 conspired to cover up their First Amendment violations. Conspiracy is not itself a  
4 constitutional tort under 42 U.S.C. § 1983. Lacey v. Maricopa County, 693 F.3d 896, 935  
5 (9th Cir. 2012). Because the Court construes the complaint liberally, the Court presumes  
6 that Plaintiff is alleging that Defendants have engaged in a civil conspiracy. Under  
7 California law, civil conspiracy requires a plaintiff to plead that “the conspiring parties  
8 reached a unity of purpose or a common design and understanding, or a meeting of the minds  
9 in an unlawful arrangement.” See Gilbrook v. City of Westminster, 177 F.3d 839, 856  
10 (1999) (citing Vieux v. East Bay Reg’l Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990)).  
11 Each conspirator “need not know the exact details of the plan, but each participant must at  
12 least share the common objective of the conspiracy.” Id. at 856 (citing United Steelworkers  
13 of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1541 (9th Cir.1989) (en banc)). Civil  
14 conspiracy claims are subject to a heightened pleading standard, demanding that a plaintiff  
15 allege specific facts “containing evidence of unlawful intent, or face dismissal of the claim.”  
16 Buckey v. Cnty. of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992).

17           Plaintiff’s amended complaint does not make any such specific allegations. Plaintiff  
18 does not allege any “meeting of the minds” between Defendants Williams, Love, Bell,  
19 Ducart, Hodges, and Zamora to violate Plaintiff’s First Amendment rights. Such a failure to  
20 plead any specific allegations demands that the conspiracy claim be dismissed. See Buckey,  
21 968 F.2d at 794. Because this deficiency could feasibly be cured through amendment, the  
22 Court will dismiss the civil conspiracy claims with leave to amend, if Plaintiff can truthfully  
23 do so. See Eldridge, 832 F.2d at 1135–36. Plaintiff is cautioned that “[t]hreadbare recitals of  
24 the elements of a cause of action, supported by mere conclusory statements, do not suffice [to  
25 meet Rule 8’s pleading requirements].” Ashcroft, 556 U.S. at 678.

26                   **f.       Due Process**

27           Plaintiff claims that Defendants Burris, Countess, Frisk, and Hall violated his due  
28 process rights by failing to give him notice and a hearing with respect to his incoming mail

1 from Michael Roe and his outgoing mail to Mary Ratcliff.<sup>6</sup>

2 Interests that are procedurally protected by the Due Process Clause may arise from  
3 two sources—the Due Process Clause itself and laws of the states. Meachum v. Fano, 427  
4 U.S. 215, 223–27 (1976). In the prison context, these interests are generally ones pertaining  
5 to liberty. Changes in conditions so severe as to affect the sentence imposed in an  
6 unexpected manner implicate the Due Process Clause itself, whether or not they are  
7 authorized by state law. Sandin v. Conner, 515 U.S. 472, 484 (1995) (citing Vitek v. Jones,  
8 445 U.S. 480, 493 (1980) (transfer to mental hospital), and Washington v. Harper, 494 U.S.  
9 210, 221–22 (1990) (involuntary administration of psychotropic drugs). A state may not  
10 impose such changes without complying with minimum requirements of procedural due  
11 process. Id. at 484.

12 Deprivations that are authorized by state law and are less severe or more closely  
13 related to the expected terms of confinement may also amount to deprivations of a  
14 procedurally protected liberty interest, provided that (1) state statutes or regulations narrowly  
15 restrict the power of prison officials to impose the deprivation, i.e., give the inmate a kind of  
16 right to avoid it, and (2) the liberty in question is one of “real substance.” Id. at 477–87.  
17 Generally, “real substance” will be limited to freedom from (1) a restraint that imposes  
18 “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison  
19 life,” id. at 484, or (2) state action that “will inevitably affect the duration of [a] sentence,” id.  
20 at 487.

21 Plaintiff’s allegations are insufficient to state a due process claim. The four alleged  
22 confiscation of his mail, as described in the amended complaint, did not constitute a severe  
23 change in his conditions of his confinement. Nor did it impose an atypical and significant  
24 hardship on Plaintiff in relation to the ordinary incidents of prison life. Accordingly, this  
25 claim is DISMISSED with prejudice.

26  
27  
28 <sup>6</sup>This claim is his twelfth causes of action. See Docket No. 11 at 61 and Docket No. 1-1  
at 1.

1           **2. Additional Defendants**

2           **a. Defendant D. Gongora**

3           Plaintiff also names Correctional Officer D. Gongora as a defendant. See Docket No.  
4 11 at 1 and 12. He identifies Gongora as “a member of the Security Squad and assigned to  
5 the IGI.” See id. at 12. Plaintiff alleges that Gongora’s responsibilities include screening  
6 and processing mail, and that Gongora “was aware of the unlawful obstruction and  
7 confiscation of Plaintiff’s incoming and outgoing mail for reasons of retaliation and failed to  
8 correct the unlawful behavior.” See id. Plaintiff’s only specific factual allegation regarding  
9 Gongora is as follows: Plaintiff submitted an inmate request for interview to Gongora in an  
10 unrelated matter regarding confiscated material. Gongora never responded to the interview  
11 request which limited Plaintiff’s ability to produce documents necessary to successfully  
12 resubmit the rejection of his appeal regarding the Roe mailing. See id. at 27. Plaintiff does  
13 not name Gongora in any cause of action.

14           Plaintiff has failed to specify what constitutional right Gongora violated and how  
15 Gongora violated that right. His general allegation that Gongora was responsible for  
16 screening and processing mail does not directly link Gongora to the specific First  
17 Amendment violations described *supra*. Nor does Gongora’s failure to respond to the  
18 interview request directly link Gongora to the alleged constitutional violations. Defendant  
19 Gongora is DISMISSED from this complaint with leave to amend. If Plaintiff chooses to  
20 replead claims against Defendant Gongora, he must identify what constitutional right  
21 Defendant Gongora deprived him of, and he must plead factual content that allows the Court  
22 to draw the reasonable inference that Defendant Gongora engaged in “an affirmative act,  
23 participate[d] in another’s affirmative acts, or omit[ted] to perform an act which he [wa]s  
24 legally required to do that cause[d] the deprivation of which [the Plaintiff complains].” Leer,  
25 844 F.2d at 633 (quoting Johnson, 588 F.2d at 743).

26           **b. Doe Defendants**

27           The use of Doe defendants is not favored in the Ninth Circuit. See Gillespie v.  
28 Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). However, where the identity of alleged

1 defendants cannot be known prior to the filing of a complaint the plaintiff should be given an  
2 opportunity through discovery to identify them. Id. Failure to afford the plaintiff such an  
3 opportunity is error. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).  
4 Accordingly, the claims against Defendants John Doe(s) 1-10 are DISMISSED from this  
5 action without prejudice. Should Plaintiff learn the identity of these Doe defendants through  
6 discovery, he may move to file an amended complaint to add them as named defendants. See  
7 Brass v. County of Los Angeles, 328 F.3d 1192, 1195–98 (9th Cir. 2003).

8 **C. Motion to Appoint Counsel**

9 Plaintiff has filed a motion requesting appointment of counsel. (Docket No. 10.) He  
10 argues that appointment of counsel is warranted because he is indigent; he is untrained in the  
11 law; the issues are complex; he has difficulties obtaining declarations from key witnesses;  
12 and his potential release from solitary confinement will be a difficult transition.

13 “[I]t is well-established that there is generally no constitutional right to counsel in  
14 civil cases.” United States v. Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996). Nonetheless,  
15 under 28 U.S.C. § 1915(e)(1), the Court has the discretion to appoint volunteer counsel for  
16 “any person unable to afford counsel.” The decision to request counsel to represent an  
17 indigent litigant under section 1915 is within “the sound discretion of the trial court and is  
18 granted only in exceptional circumstances.” Franklin v. Murphy, 745 F.2d 1221, 1236 (9th  
19 Cir. 1984). A finding of the “exceptional circumstances” requires an evaluation of the  
20 likelihood of the plaintiff’s success on the merits and an evaluation of the plaintiff’s ability to  
21 articulate his claims pro se in light of the complexity of the legal issues involved. See  
22 Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004); Terrell v.  
23 Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331  
24 (9th Cir. 1986). Neither of these factors is dispositive and both must be viewed together  
25 before deciding on a request for counsel under § 1915(e)(1).

26 Here, the Court finds that Plaintiff has adequately articulated his claims and the issues  
27 are not complex. Therefore, at this time, the Court DENIES Plaintiff’s motion to appoint  
28 counsel for lack of exceptional circumstances. The Court will consider appointment of

1 counsel on its own motion, and seek volunteer counsel to agree to represent Plaintiff pro  
2 bono, if it determines at a later time in the proceedings that appointment of counsel is  
3 warranted.

#### 4 CONCLUSION

5 For the foregoing reasons, the Court hereby orders as follows:

6 1. Defendants Yates and Nickell are DISMISSED from this action with prejudice.

7 2. The due process claims against Defendants Burris, Countess, Frisk and Hall are  
8 DISMISSED with prejudice.

9 3. Defendants John Doe(s) 1-10 are DISMISSED from this action without  
10 prejudice. Should Plaintiff learn the identity of these Doe defendants through discovery, he  
11 may move to file an amended complaint to add them as named defendants.

12 4. The First Amendment claim against Defendant Hall; and the conspiracy claim  
13 against Defendants Williams, Love, Bell, Ducart, Hodges, and Zamora are DISMISSED with  
14 leave to amend. Defendant Gongora is also DISMISSED from this complaint with leave to  
15 amend. If Plaintiff can cure the pleading deficiencies described above, he shall file an  
16 AMENDED COMPLAINT within **twenty-eight (28)** days from the date this order is filed.  
17 The amended complaint must include the caption and civil case number used in this order (C  
18 14-5578 MEJ (PR)) and the words SECOND AMENDED COMPLAINT on the first page.  
19 Plaintiff is advised that he must state facts in the amendment about each Defendant's actions  
20 that are sufficient to present a plausible claim that each violated his rights. See Barren v.  
21 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (“[a] plaintiff must allege facts, not simply  
22 conclusions, that show that an individual was personally involved in the deprivation of his  
23 civil rights.”). **Failure to file an amended complaint by the deadline will result in the**  
24 **dismissal of these claims with prejudice.**

25 Plaintiff is advised that an amended complaint supersedes the original complaint.  
26 “[A] plaintiff waives all causes of action alleged in the original complaint which are not  
27 alleged in the amended complaint.” London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th  
28 Cir. 1981). Plaintiff may not incorporate material from the prior complaint by reference.

1 Defendants not named in an amended complaint are no longer defendants. See Ferdik, 963  
2 F.2d at 1262.

3           5.       The Court finds that Plaintiff has stated the following cognizable claims:  
4 violation of the First Amendment right to send mail against Defendants Burris, Countess, and  
5 Frisk; violation of the First Amendment right to receive mail against Defendants Frisk and  
6 Patton; First Amendment retaliation claim against Burris, Frisk, and Patton; and First  
7 Amendment access to the courts claims against Bramucci, Bond, Ducart, Hodges, Allen, and  
8 Zamora. The Clerk shall issue a summons and Magistrate Judge jurisdiction consent form  
9 and the United States Marshal shall serve, without prepayment of fees, the summons,  
10 Magistrate Judge jurisdiction consent form, copies of the amended complaint with  
11 attachments, and copies of this order on Defendants Burris, Countess, Frisk, Patton,  
12 Bramucci, Bond, and Ducart at Pelican Bay State Prison, 5905 Lake Earl Drive, Crescent  
13 City, CA 95531, and on Defendants Zamora, Hodges, and Allen at Inmate Appeals Branch,  
14 Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento CA 94283.

15           The Clerk also shall mail a courtesy copy of the amended complaint and a copy of this  
16 order to the California Attorney General's Office.

17           6.       In order to expedite the resolution of this case, the Court orders as follows:

18               a.       No later than **91 days** from the date this order is filed, Defendants must  
19 file and serve a motion for summary judgment or other dispositive motion. A motion for  
20 summary judgment also must be accompanied by a Rand notice so that Plaintiff will have  
21 fair, timely and adequate notice of what is required of him in order to oppose the motion.  
22 Woods v. Carey, 684 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in Rand v.  
23 Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with motion for  
24 summary judgment).<sup>7</sup>

---

25  
26           <sup>7</sup> If Defendants assert that Plaintiff failed to exhaust his available administrative remedies  
27 as required by 42 U.S.C. § 1997e(a), Defendants must raise such argument in a motion for  
28 summary judgment, pursuant to the Ninth Circuit's recent opinion in Albino v. Baca, 747 F.3d  
1162 (9th Cir. 2014) (en banc) (overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.  
2003), which held that failure to exhaust available administrative remedies under the Prison  
Litigation Reform Act, should be raised by a defendant as an unenumerated Rule 12(b) motion).

1 If Defendants are of the opinion that this case cannot be resolved by summary  
2 judgment, Defendants must so inform the Court prior to the date the motion is due.

3 b. Plaintiff's opposition to the summary judgment or other dispositive  
4 motion must be filed with the Court and served upon Defendants no later than **28 days** from  
5 the date the motion is filed. Plaintiff must bear in mind the notice and warning regarding  
6 summary judgment provided later in this order as he prepares his opposition to any motion  
7 for summary judgment.

8 c. Defendants shall file a reply brief no later than **14 days** after the date the  
9 opposition is filed. The motion shall be deemed submitted as of the date the reply brief is  
10 due. No hearing will be held on the motion.

11 7. Plaintiff is advised that a motion for summary judgment under Rule 56 of the  
12 Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you  
13 must do in order to oppose a motion for summary judgment. Generally, summary judgment  
14 must be granted when there is no genuine issue of material fact — that is, if there is no real  
15 dispute about any fact that would affect the result of your case, the party who asked for  
16 summary judgment is entitled to judgment as a matter of law, which will end your case.  
17 When a party you are suing makes a motion for summary judgment that is properly supported  
18 by declarations (or other sworn testimony), you cannot simply rely on what your complaint  
19 says. Instead, you must set out specific facts in declarations, depositions, answers to  
20 interrogatories, or authenticated documents, as provided in Rule 56(c), that contradict the  
21 facts shown in the Defendants' declarations and documents and show that there is a genuine  
22 issue of material fact for trial. If you do not submit your own evidence in opposition,  
23 summary judgment, if appropriate, may be entered against you. If summary judgment is  
24 granted, your case will be dismissed and there will be no trial. Rand v. Rowland, 154 F.3d

25  
26  
27  
28 Such a motion should also incorporate a modified Wyatt notice in light of Albino. See Wyatt v. Terhune, 315 F.3d 1108, 1120, n.14 (9th Cir. 2003); Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012).

1 952, 962–63 (9th Cir. 1998) (en banc) (App. A).<sup>8</sup>

2 8. All communications by Plaintiff with the Court must be served on Defendants'  
3 counsel by mailing a true copy of the document to Defendants' counsel. The Court may  
4 disregard any document which a party files but fails to send a copy of to his opponent. Until  
5 Defendants' counsel has been designated, Plaintiff may mail a true copy of the document  
6 directly to Defendants, but once Defendants are represented by counsel, all documents must  
7 be mailed to counsel rather than directly to Defendants.

8 9. Discovery may be taken in accordance with the Federal Rules of Civil  
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
10 Rule 16 is required before the parties may conduct discovery.

11 10. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep  
12 the Court informed of any change of address and must comply with the Court's orders in a  
13 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
14 prosecute pursuant to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of  
15 change of address in every pending case every time he is moved to a new facility.

16 11. Any motion for an extension of time must be filed no later than the deadline  
17 sought to be extended and must be accompanied by a showing of good cause.

18 12. Plaintiff is cautioned that he must include the case name and case number for  
19 this case on any document he submits to the Court for consideration in this case.

20 13. The Clerk shall send Plaintiff a blank civil rights form along with his copy of  
21 this order.

22 IT IS SO ORDERED.

23  
24 DATED: December 14, 2016

  
\_\_\_\_\_  
Maria-Elena James  
United States Magistrate Judge

25  
26  
27  
28 <sup>8</sup> The Rand notice provided herein does not excuse Defendants' obligation to serve said notice again concurrently with a motion for summary judgment. Woods, 684 F.3d at 939.