

## 1 IN THE UNITED STATES DISTRICT COURT

## 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 BRIAN KEITH BARNETT, No. C 06-0193 CW (PR)

4 Plaintiff, ORDER GRANTING DEFENDANTS'  
5 v. MOTION TO DISMISS6 MICHAEL EVANS, et al., (Docket nos. 51, 65, 74)  
7 Defendants.

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9 Plaintiff Brian Keith Barnett, a state prisoner who was  
10 incarcerated at Salinas Valley State Prison (SVSP) at the time of  
11 the events at issue,<sup>1</sup> filed a pro se civil rights complaint under  
12 42 U.S.C. § 1983. Thereafter, he filed an amended complaint,  
13 alleging that prison officials at SVSP improperly confiscated his  
14 personal property and denied him access to the courts.  
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16 In an Order dated January 9, 2008, the Court found that  
17 Plaintiff stated: (1) a cognizable claim for deprivation of  
18 personal property against Defendants SVSP Correctional Captain A.  
19 Hedgpeth, Correctional Officer S. Younce, Deputy Warden L. E.  
20 Scribner, and Appeals Examiners K. J. Allen and N. Grannis; (2) a  
21 cognizable claim of denial of access to the courts against  
22 Defendants Grannis and Hedgpeth stemming from an incident on  
23 October 29, 2002; and (3) a cognizable claim of denial of access to  
24 the courts against Defendant Younce stemming from an incident on  
25 September 4, 2004. (Jan. 9, 2008 Order at 13.) The Court  
26 dismissed with prejudice Plaintiff's claims against all other  
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<sup>1</sup> Plaintiff is currently incarcerated at California State  
Prison - Corcoran.

1 Defendants.

2 Defendants now move to dismiss Plaintiff's amended complaint  
3 on the grounds that: (1) Plaintiff's claim of denial of access to  
4 the courts in 2002 is barred by the statute of limitations; (2) his  
5 factual allegations fail to state a claim of deprivation of  
6 property under Federal Rule of Civil Procedure 12(b)(6); (3) his  
7 factual allegations fail to state a claim of denial of access to  
8 the courts because he has failed to allege actual injury resulting  
9 from the alleged violations in 2002 and 2004; (4) his allegations  
10 against Defendants Hedgpeth, Allen, Scribner and Grannis do not  
11 raise actionable claims under § 1983 because there is no  
12 constitutional right to a prison grievance process; and  
13 (5) Defendants are entitled to qualified immunity from suit.  
14 Plaintiff has filed an opposition to the motion, and Defendants  
15 have filed their reply.

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17 For the reasons discussed below, the Court GRANTS Defendants'  
18 motion to dismiss.  
19

20 BACKGROUND

21 The following factual allegations are taken from Plaintiff's  
22 amended complaint, his opposition to Defendants' motion to dismiss  
23 and exhibits attached to his opposition.

24 On October 29, 2002, Plaintiff was transferred from Ironwood  
25 State Prison to SVSP. Prior to being transferred, Plaintiff began  
26 preparing his pro se petition for a writ of habeas corpus using  
27 legal materials contained in six boxes.  
28

1 After Plaintiff arrived at SVSP, he was told that he could  
2 only have "six cubic feet" of his property pursuant to Title 15 of  
3 the California Code of Regulations § 3190(b), which states in  
4 part, "The combined volume of state-issued and allowable personal  
5 property items shall not exceed six cubic feet . . . ." Cal.  
6 Code. Regs. tit. 15, § 3190(b). This meant that Plaintiff had  
7 access to four of the six boxes of legal material, and two of his  
8 boxes were placed at the prison's receiving and release (R&R)  
9 area.  
10

11 Plaintiff wrote a request for access to all his legal  
12 materials explaining that it was necessary for him to have  
13 immediate access to them while he was writing his habeas petition.  
14 Prison officials instructed Plaintiff to submit "request for  
15 interview" forms in order to gain access to the two boxes, which  
16 were being held at R&R. Plaintiff claims he submitted "request  
17 for interview forms via institutional mail addressed to the R&R  
18 supervisor requesting access to his legal materials stored in  
19 R&R." (Am. Compl. at 3-C.) He claims his written requests were  
20 ignored.  
21

22 On October 30, 2002, Plaintiff filed SVSP administrative  
23 appeal number B-02-4397 after he failed to obtain access to his  
24 legal materials. (Pl.'s Ex. A.) Plaintiff alleges that on  
25 December 10, 2002, he was interviewed by G. K. Crawford, SVSP  
26 Supervisor of Vocational Instruction, who said that he spoke with  
27 SVSP R&R Correctional Sergeant Mantel who confirmed that Plaintiff  
28

1 had two additional boxes of legal material in storage. Plaintiff  
2 claims that Supervisor Crawford was sympathetic to his problem,  
3 but did not obtain the legal materials for him.

4 On December 11, 2002, Plaintiff's appeal was partially  
5 granted, according to the first level response (FLR) written by  
6 Supervisor Crawford and SVSP Correctional Administrator J.  
7 Allison, which stated:  
8

9 Upon reviewing the facts provided, appellant can receive  
10 access to his legal material by setting up a date and time,  
11 through custody staff, to review his legal material at R&R.  
12 Additionally, by reducing the amount of property he  
13 currently has in his cell, he may be able to receive the  
14 property that is being stored in R&R.

15 (Pl.'s Ex. A, FLR dated Dec. 11, 2002 at 1.) Plaintiff claims  
16 that he forwarded his appeal to the second formal level of review  
17 because no steps were taken to retrieve the missing property.

18 On January 21, 2003, his appeal was granted in part,  
19 according to the second level response (SLR) written by SVSP Chief  
20 Deputy Warden Edward J. Caden, who stated in part:

21 The response at the 1st Level of review indicated two  
22 methods for accessing the legal materials requested. No  
23 indication of the appellant attempting to utilize either  
24 method was provided. The six cubic foot maximum allowable  
25 property is designed to limit the amount of material in the  
26 cells to facilitate searches and the amount of fuel  
27 available in case of fire.

28 The appellant is advised to access his legal material stored  
in R&R by one of the means outlined in the first level  
response.

(Pl.'s Ex. A, SLR dated Jan. 21, 2003 at 2.) Plaintiff claims  
that still nothing was done to retrieve his property; therefore he  
submitted his appeal for review at the Director's level.

1           On April 29, 2003, Defendant Grannis, as Chief of the Inmate  
2 Appeals Branch, denied Plaintiff's appeal at the Director's level  
3 without interviewing Plaintiff. Plaintiff claims Defendant  
4 Grannis is "liable for his failure to pick up his phone or send  
5 written instruction[s] to the warden at Salinas Valley State  
6 Prison directing that the Plaintiff be taken to R&R to access his  
7 legal materials and records when he knew or reasonably should have  
8 known of the violation of the Plaintiff's constitutional rights of  
9 meaningful access to the courts . . . ." (Id. at 3-C-3-D.)  
10 According to the Director's Level Appeal Decision, Defendant  
11 Grannis declined to modify the decision at the FLR and SLR, which  
12 had provided Plaintiff a remedy. She stated:

14           Staff affirmed that the appellant possess two boxes of legal  
15 material in R&R; however, contact with Correctional Sergeant  
16 Mantel, R&R Sergeant, SVSP, during the Director's Level of  
17 Review (DLR), revealed that the appellant has yet to submit  
18 a request to obtain any legal material out of either box.  
19 In that the appellant failed to comply with the options  
provided him during the FLR, it is viewed that he has not  
been adversely impacted, nor have staff denied him access to  
his legal material. Further review at the DLR is not  
warranted.

20 (Pl.'s Ex. A, Director's Level Appeal Decision dated Apr. 29, 2003  
21 at 1.)

22           Plaintiff alleges that on May 7, 2003 he wrote letters  
23 concerning his missing legal materials to SVSP Warden A. A.  
24 Lamarque and California Department of Corrections and  
25 Rehabilitation (CDCR) Director E. S. Alameida as well as his  
26 successor Jeanne Woodford. Thereafter, Plaintiff received a copy  
27 of a memorandum from the CDCR dated September 29, 2003 and  
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1 addressed to Warden Lamarque. In the memorandum, CDCR Regional  
2 Administrator G. Galaza directed Warden Lamarque to "review this  
3 issue, prepare a response and forward a copy to the Central Region  
4 Office by October 23, 2003." (Pl.'s Ex. B, Sept. 29, 2003  
5 Memorandum by G. Galaza at 1.) In response to this memorandum,  
6 Defendant Hedgpeth interviewed Plaintiff on October 8, 2003.  
7 Officer Archibald, the package/property officer, was also present  
8 during the interview. When Plaintiff insisted there were two more  
9 boxes of legal property that was missing, Defendant Hedgpeth  
10 instructed Officer Archibald to inquire further into the matter.  
11 On October 9, 2003, Defendant Hedgpeth sent a letter to Plaintiff  
12 explaining that all of Plaintiff's property had been issued to  
13 him:  
14

15 On October 9, 2003, Officer Archibald reviewed and made  
16 a copy of your property card that is kept in R&R (see  
17 attached). On your property card, it is documented  
18 that you received six (6) boxes of property October 30,  
19 2002. It is listed that there is no property in R&R  
20 that belongs to you. Based on this information, your  
21 legal material appears to have been issued to you.

22 (Pl.'s Ex. B., Oct. 9, 2003 Memorandum by Def. Hedgpeth at 1.)<sup>2</sup>

23 Defendant Hedgpeth further noted that Plaintiff had "filed a CDC  
24 602 and a Board of Control claim form concerning [his] missing  
25 property." (Id.) Defendant Hedgpeth determined that even though  
26 Plaintiff stated that he was still missing his legal materials, he  
27 "properly addressed this issue by utilizing the appeal process."

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28 <sup>2</sup> The Court notes that a copy of Plaintiff's property card is  
not attached to Defendant Hedgpeth's Oct. 9, 2003 memorandum, which  
is attached as Exhibit B to Plaintiff's opposition to the motion to  
dismiss.

1 (Id.) Therefore, Defendant Hedgpeth informed Plaintiff that he  
2 could do nothing further, stating "There is no further remedy that  
3 I can address for you at this time." (Id.)

4 On June 16, 2004, Plaintiff asked to be placed in  
5 administrative segregation to avoid a "hostile and potentially  
6 violent confrontation." (Id. at 3-G.) Plaintiff alleges he was  
7 fraudulently charged with battery on a peace officer. On June 20,  
8 2004, he was placed in administrative segregation, where he was  
9 denied access to all his personal belongings. After being housed  
10 in administrative segregation for approximately eighty days,  
11 Plaintiff was placed in a holding cell at SVSP Facility D.

12 On September 4, 2004, while Plaintiff was housed at SVSP  
13 Facility D, he requested that his legal documents be returned to  
14 him. Defendant Younce informed Plaintiff that the only legal  
15 materials he could have access to were those pertaining to his  
16 active case in the Monterey County Superior Court, Barnett v.  
17 Payton, case number M68859. Plaintiff claims that Defendant  
18 Younce refused to allow Plaintiff access to his "folders  
19 containing his preparatory federal civil rights papers because  
20 [Defendant Younce] claimed the Plaintiff could only obtain  
21 documentation and records relative to a[n] active case docketed in  
22 the courts." (Id. at 3-H.) Defendant Younce also denied  
23 Plaintiff's request "to extract a specific envelope out of  
24 [Plaintiff's] property that contained approximately \$47.00 in U.S.  
25 postage." (Id.) Finally, Defendant Younce asked Plaintiff "what  
26 he was going to do with his food items," and when Plaintiff did  
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1 not respond, Defendant Younce seized the food items. (Id.)  
2 Plaintiff claims he "said nothing" in response because "he had not  
3 been found guilty of any security housing unit type of offense so  
4 no disposition [of the food items] was required." (Id.) After  
5 Plaintiff was "released from D1 administrative segregation to  
6 Facility D general population," he was given access to his  
7 personal property. (Id.) However, he claims that some personal  
8 items were missing, including his food items and postage stamps.  
9 (Id. at 3-I.) Plaintiff alleges that the missing property was  
10 seized by Defendant Younce pursuant to SVSP Operational Procedure  
11 no. 10. (Id.)

13 In response to Defendant Younce's actions, Plaintiff filed  
14 SVSP administrative appeal number D-04-03996. (Pl.'s Ex. J.)  
15 Plaintiff stated that, because he was living in the general prison  
16 population, SVSP Operational Procedure no. 10 required that all  
17 his property be returned to him. He alleged that his property was  
18 not returned to him because of the failure of the prison officials  
19 properly to update institutional operational procedures and to  
20 train subordinates. Appeal number D-04-03996 was denied by  
21 Defendant Hedgpeth at the first formal level of review, by  
22 Defendant Scribner at the second formal level of review, and by  
23 Defendants Allen and Grannis at the Director's level of review.

25 Plaintiff alleges that, on November 16, 2007, the two missing  
26 boxes were returned to him when he was transferred to the  
27 California State Prison - Corcoran. (Opp'n at 1.)  
28



LEGAL STANDARD

1  
2 A complaint must contain a "short and plain statement of the  
3 claim showing that the pleader is entitled to relief." Fed. R.  
4 Civ. P. 8(a). When considering a motion to dismiss under Rule  
5 12(b)(6) for failure to state a claim, dismissal is appropriate  
6 only when the complaint does not give the defendant fair notice of  
7 a legally cognizable claim and the grounds on which it rests. See  
8 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964  
9 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)).  
10

11 In considering whether the complaint is sufficient to state a  
12 claim, the district court must accept all factual allegations as  
13 true and construe them in the light most favorable to the  
14 plaintiff. Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 2200  
15 (2007); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.  
16 1986). However, the court need not accept as true allegations  
17 that are legal conclusions, unwarranted deductions of fact or  
18 unreasonable inferences. See Sprewell v. Golden State Warriors,  
19 266 F.3d 979, 988, amended, 275 F.3d 1187 (9th Cir. 2001).  
20 Dismissal can be based on the lack of a cognizable legal theory or  
21 the absence of sufficient facts alleged under a cognizable legal  
22 theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
23 (9th Cir. 1990). The court need not accept as true allegations  
24 that contradict facts which may be judicially noticed by the  
25 court. See Mullis v. United States Bankr. Ct., 828 F.2d 1385,  
26 1388 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988).  
27  
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1           Although the court is generally confined to consideration of  
2 the allegations in the pleadings, when the complaint is  
3 accompanied by attached documents, such documents are deemed part  
4 of the complaint and may be considered in evaluating the merits of  
5 a Rule 12(b)(6) motion.<sup>3</sup> Durning v. First Boston Corp., 815 F.2d  
6 1265, 1267 (9th Cir. 1987). The court can also consider documents  
7 the complaint necessarily relies on and whose authenticity is not  
8 contested. See Lee v. County of Los Angeles, 250 F.3d 668, 688  
9 (9th Cir. 2001). In addition, the court may take judicial notice  
10 of facts that are not subject to reasonable dispute. See id. at  
11 688 (discussing Fed. R. Evid. 201(b)). Allegations of fact in the  
12 complaint must be taken as true and construed in the light most  
13 favorable to the non-moving party. See Parks Sch. of Bus. v.  
14 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

16           A plaintiff may plead himself out of a claim by including  
17 unnecessary details contrary to his claims. Sprewell v. Golden  
18 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). A court, for  
19 example, is not required to accept as true conclusory allegations  
20 which are contradicted by documents referred to in the complaint.  
21 Bell Atl. Corp., 127 S. Ct. at 1965; Steckman v. Hart Brewing,  
22 Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998). After all,  
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25           <sup>3</sup> However, the attachment of a document as an exhibit to the  
26 complaint does not mean that the plaintiff has adopted as true all  
27 the statements in the document. See Gant v. Wallingford Bd. of  
28 Educ., 69 F.3d 669, 674 (2d Cir. 1995). The attached document will  
be read to evidence what it incontestably shows once one assumes  
that it is what the complaint says it is or that it is what it  
appears to be. See id.

1 "conclusory allegations without more are insufficient to defeat a  
2 motion to dismiss for failure to state a claim." McGlinchy v.  
3 Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988). A court  
4 "is not required to accept legal conclusions cast in the form of  
5 factual allegations if those conclusions cannot reasonably be  
6 drawn from the facts alleged." Clegg v. Cult Awareness Network,  
7 18 F.3d 752, 754-55 (9th Cir. 1994).  
8

9 Although a Rule 12(b)(6) motion usually is not available to  
10 raise an affirmative defense, it may be used when the complaint  
11 contains allegations showing a complete defense or bar to  
12 recovery, such as a statute of limitations problem. See Jablon v.  
13 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). Dismissal  
14 on statute of limitations grounds can be granted pursuant to Rule  
15 12(b)(6) "only if the assertions of the complaint, read with the  
16 required liberality, would not permit the plaintiff to prove that  
17 the statute was tolled." Id.  
18

19 DISCUSSION

20 I. Defendant Younce

21 On September 16, 2008, counsel for Defendants filed a  
22 "Statement Noting Defendant Younce's Death and Request to Dismiss  
23 Him From This Action," stating that Defendant Younce died on  
24 September 1, 2008. Counsel made no mention of Defendant Younce's  
25 successor or representative. Plaintiff was made aware of  
26 Defendant Younce's death because a copy of the statement above was  
27 sent to Plaintiff at his current address. More than six months  
28

1 have passed and neither party has filed a motion for substitution  
2 naming Defendant Younce's successor or representative pursuant to  
3 Federal Rule of Civil Procedure 25(a)(1), which states:

4       If a party dies and the claim is not extinguished, the  
5       court may order substitution of the proper party. A  
6       motion for substitution may be made by any party or by  
7       the decedent's successor or representative. If the  
8       motion is not made within 90 days after service of a  
9       statement noting the death, the action by or against the  
10      decedent must be dismissed.

9 Fed. R. Civ. P. 25(a)(1).

10       Because no motion for substitution has been made within ninety  
11      days after service of a statement noting the death, Plaintiff's  
12      claims against Defendant Younce -- including claims of deprivation  
13      of personal property and denial of access to the courts stemming  
14      from the September 4, 2004 incident -- are DISMISSED.

15       Plaintiff's claim of deprivation of personal property is also  
16      made against some of the remaining Defendants, as discussed below.

17      II. Claim Relating to Deprivation of Personal Property

18       Defendants Hedgpeth, Grannis, Allen and Scribner denied  
19      Plaintiff's administrative appeals stemming from the September 4,  
20      2004 incident at various levels of review. The Court initially  
21      found Plaintiff's claim of deprivation of personal property  
22      against these Defendants cognizable because they allegedly  
23      reviewed his appeals and did not remedy the constitutional  
24      violations. (Jan. 9, 2008 Order at 10.)

25       Defendants move for the dismissal of Plaintiff's allegations  
26      involving the deprivation of his property against Defendants  
27      Hedgpeth, Grannis, Allen and Scribner because they cannot serve as  
28

1 the basis for liability for a due process violation under a § 1983  
2 action.

3       When a prisoner suffers a property loss that is random and  
4 unauthorized his remedy lies with the State, as neither the  
5 negligent nor intentional deprivation of property states a due  
6 process claim under § 1983 under such circumstances. See Parratt  
7 v. Taylor, 451 U.S. 527, 535-44 (1981) (state employee negligently  
8 lost prisoner's hobby kit), overruled in part on other grounds,  
9 Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Hudson v.  
10 Palmer, 468 U.S. 517, 533 (1984) (intentional destruction of  
11 inmate's property). The availability of an adequate state  
12 post-deprivation remedy, for example a state tort action,  
13 precludes relief because it provides adequate procedural due  
14 process. King v. Massarweh, 782 F.2d 825, 826 (9th Cir. 1986).  
15 California law provides an adequate post-deprivation remedy for  
16 any property deprivation. Barnett v. Centoni, 31 F.3d 813, 816-17  
17 (9th Cir. 1994) (citing Cal. Gov't Code §§ 810-895). However,  
18 allegations that a plaintiff has been deprived of his property  
19 negligently or intentionally without a pre-deprivation hearing do  
20 not state a due process claim under § 1983 if the deprivation was  
21 random and unauthorized because, as mentioned above, California  
22 provides an adequate state post-deprivation remedy. See Zinermon  
23 v. Burch, 494 U.S. 113, 128-29 (1990) (where state cannot foresee  
24 and therefore provide meaningful hearing prior to deprivation,  
25 statutory provision for post-deprivation hearing or common law  
26  
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1 tort remedy for erroneous deprivation satisfies due process).

2 Defendants argue that to the extent that Plaintiff maintains  
3 that prison officials acted randomly and without authorization by  
4 confiscating and failing to return his property, he fails to state  
5 a claim upon which relief may be granted under § 1983. See  
6 Barnett, 31 F.3d at 816.

7  
8 Here, Plaintiff's allegations in the amended complaint that  
9 his personal property -- food items and postage stamps -- was lost  
10 or destroyed are not cognizable in a § 1983 action. He alleges  
11 random and unauthorized deprivations of personal property without  
12 a pre-deprivation hearing, but that kind of conduct does not  
13 amount to a violation of any federal constitutional right. See  
14 Zinermon, 494 U.S. at 128-29.

15 Accordingly, the Court GRANTS Defendants' motion to dismiss  
16 Plaintiff's deprivation of property claim against Defendants  
17 Hedgpeth, Grannis, Allen and Scribner for failure to state a claim  
18 upon which relief may be granted.

19  
20 III. Denial of Access to the Courts

21 In its Order of January 9, 2008, the Court found a cognizable  
22 claim of denial of access to the courts against Defendant Grannis  
23 and Hedgpeth, stemming from the fact that Plaintiff was prevented  
24 from filing a habeas petition when officers denied him access to  
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1 his property on October 29, 2002.<sup>4</sup>

2 Defendants argue that Plaintiff's claim of denial of access  
3 to the courts in 2002 against Defendant Grannis should be  
4 dismissed because Plaintiff has "no constitutional right to a  
5 prison grievance process." (Mot. to Dismiss at 13 (citing Ramirez  
6 v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003)).) However, the  
7 Court has already found that Defendant Grannis could be liable for  
8 reviewing Plaintiff's appeal regarding his 2002 denial of access  
9 to the courts claim and failing to remedy the ongoing  
10 constitutional violation. (Jan. 9, 2008 Order at 10-12.)  
11 Accordingly, the Court DENIES Defendants' motion to dismiss on  
12 this ground.  
13

14 Defendants also contend that Plaintiff's claim of denial of  
15 access to the courts in 2002 is barred by the applicable statute  
16 of limitations.

17 Section 1983 does not contain its own limitations period.  
18 The appropriate period is that of the forum state's statute of  
19 limitations for personal injury torts. Wilson v. Garcia, 471 U.S.  
20 261, 276 (1985), superseded by statute on other grounds, as stated  
21 in Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377-78  
22 (2004); Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir.  
23  
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25  
26 <sup>4</sup> The Court also found Plaintiff stated cognizable claims of  
27 denial of access to the courts against Defendants Younce stemming  
28 from the September 4, 2004 incident. As mentioned above, all  
claims against Defendants Younce have been dismissed; therefore,  
the Court need not address Defendants' motion to dismiss as to  
Plaintiff's claim of denial of access to the courts against  
Defendant Younce.

1 1994).

2       The Court looks to federal law to determine when a cause of  
3 action accrues and the statute of limitations begins to run in a  
4 § 1983 action. Wallace v. Kato, 549 U.S. 384, 388 (2007);  
5 Elliott, 25 F.3d at 801-02. The statute of limitations generally  
6 begins to run only once a plaintiff has knowledge of the "critical  
7 facts" of his injury, which are "that he has been hurt and who has  
8 inflicted the injury." United States v. Kubrick, 444 U.S. 111,  
9 122 (1979). But the plaintiff must be diligent in discovering the  
10 critical facts. See Bibeau v. Pac. Nw. Research Found., 188 F.3d  
11 1105, 1108 (9th Cir. 1999), amended, 208 F.3d 831 (9th Cir. 2000).  
12 A plaintiff who does not actually know that his rights were  
13 violated will be barred from bringing his claim after the running  
14 of the statute of limitations if he should have known in the  
15 exercise of due diligence. Id.

16  
17       Defendants argue that this § 1983 cause of action accrued no  
18 later than October 29, 2002, the date Plaintiff was initially  
19 denied his property. (Mot. to Dismiss at 8.)

20  
21       On October 29, 2002, California's statute of limitations for  
22 personal injury actions was one year. See former Cal. Civ. Proc.  
23 Code § 340(3) (one year general residual statute of limitations  
24 for personal injury actions); see also Elliott, 25 F.3d at 802.<sup>5</sup>

25  
26  
27 <sup>5</sup> The limitations period later changed to two years, see Cal.  
28 Civ. Proc. Code § 335.1, but that new statute went into effect  
January 1, 2003 and it does not apply retroactively to claims that  
accrued prior to that date. See Maldonado v. Harris, 370 F.3d 945,  
954-55 (9th Cir. 2004).



1 Federal courts must also give effect to a state's tolling  
2 provisions. See Hardin v. Straub, 490 U.S. 536, 543-44 (1989);  
3 Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986). In  
4 California, this includes tolling the statute of limitations  
5 during imprisonment. California Code of Civil Procedure § 352.1  
6 recognizes imprisonment as a disability that tolls the statute of  
7 limitations when a person is "imprisoned on a criminal charge, or  
8 in execution under the sentence of a criminal court for a term  
9 less than for life." See Cal. Civ. Proc. Code § 352.1(a).  
10 However, the tolling is not indefinite; the disability of  
11 imprisonment delays the accrual of the cause of action for a  
12 maximum of two years. See id.

14 Here, even if Plaintiff's cause of action accrued on October  
15 29, 2002, he remained incarcerated for at least two years  
16 thereafter. Thus under California law Plaintiff would have had,  
17 at most, three years from the date on which his claim accrued in  
18 which to file his claim. Consequently, he would have been  
19 required to do so by no later than October 29, 2005. Plaintiff,  
20 however, did not file the present action until January 11, 2006.  
21 As Plaintiff filed his complaint seventy-four days after the  
22 statute of limitations had expired, Defendants argue that his  
23 claim of denial of access to the courts in 2002 is time-barred.

25 Defendants Grannis and Hedgpeth did not become involved until  
26 they made decisions on Plaintiff's deprivation of property claim  
27 on April 29, 2003 and October 9, 2003, respectively. While  
28 Defendants argue the claim arose when Plaintiff's two boxes were

1 first taken from him and placed in R&R on October 29, 2002, the  
2 violation continued because Plaintiff alleges he was still being  
3 denied access to his property at the time of Defendants Grannis's  
4 and Hedgpeth's actions.

5         The Court need not decide whether Plaintiff's claim accrued  
6 on October 29, 2002 or whether it did not accrue against  
7 Defendants Grannis and Hedgpeth until they became involved,  
8 because in either event he is entitled to equitable tolling of the  
9 statute of limitations.  
10

11         Where the danger of prejudice to the defendant is absent, and  
12 the interests of justice so require, equitable tolling of the  
13 limitations period may be appropriate. Azer v. Connell, 306 F.3d  
14 930, 936 (9th Cir. 2002). Because the Court has borrowed  
15 California's statute of limitations, it also applies California's  
16 equitable tolling rules. Id.

17         Under California law, equitable tolling "'reliev[es]  
18 plaintiff from the bar of a limitations statute when, possessing  
19 several legal remedies he, reasonably and in good faith, pursues  
20 one designed to lessen the extent of his injuries or damage.'"  
21 Cervantes v. City of San Diego, 5 F.3d 1273, 1275 (9th Cir. 1993)  
22 (quoting Addison v. California, 21 Cal. 3d 313, 317 (1978)).

23 Thus, in an appropriate case, the statute of limitations might be  
24 tolled for time spent pursuing a remedy in another forum before  
25 filing the claim in federal court.  
26

27         Under California law, equitable tolling is appropriate in a  
28 later suit when an earlier suit was filed and the record shows:

1 "'(1) timely notice to the defendant in the first claim;  
2 (2) lack of prejudice to the defendant in gathering evidence to  
3 defend against the second claim; and (3) good faith and reasonable  
4 conduct by the plaintiff in filing the second claim.'" Daviton v.  
5 Columbia/HCA Healthcare Corp., 241 F.3d 1131, 1137-38 (9th Cir.  
6 2001) (en banc) (citing Collier v. City of Pasadena, 142 Cal. App.  
7 3d 917, 924 (1983)). The first factor, timely notice, requires  
8 that the plaintiff have filed the first claim within the statutory  
9 period. Id. at 1138. To satisfy the second factor "the facts of  
10 the two claims [should] be identical or at least so similar that  
11 the defendant's investigation of the first claim will put him in a  
12 position to fairly defend the second." Id. California law does  
13 not require that the two claims seek the same remedies, involve  
14 the same procedures, or arise from the same laws. Id. at 1141.  
15 Good faith and reasonable conduct, the third factor, is not as  
16 well defined in the case law. Id. at 1138. However, if a  
17 plaintiff simply allowed the statute on his second claim nearly to  
18 run or "deliberately misled the defendant into believing the  
19 second claim would not be filed," then a court might find bad  
20 faith. Id. (internal quotation marks and citations omitted).  
21 Upon satisfying the three-pronged test, a plaintiff should be  
22 relieved from the limitations bar. Id. at 1140; see, e.g., Azer,  
23 306 F.3d at 936-37 (granting equitable tolling where plaintiff  
24 satisfied three-prong test and finding that by filing an official-  
25 capacity action in state court plaintiff provided individual  
26 defendants within state office adequate notice that they might be  
27  
28

1 subject to a civil rights suit).

2 From the face of Plaintiff's amended complaint as well as his  
3 opposition and the documents attached thereto, it appears that he  
4 meets all three prongs of the relevant test for equitable tolling:  
5 (1) his state action was filed within the statutory period;  
6 (2) the facts of the state and federal claims are so similar that  
7 Defendants will not be prejudiced in their ability to gather  
8 evidence to defend against Plaintiff's federal claims; and  
9 (3) Plaintiff has exercised good faith and reasonable conduct in  
10 filing his federal claims. Plaintiff filed his administrative  
11 appeal relating to this claim on October 30, 2002, the day after  
12 his claim accrued.<sup>6</sup> His administrative remedies were exhausted on  
13 April 29, 2003, when his appeal was denied at the Director's  
14 level. (Pl.'s Ex. A.) Because Plaintiff was pursuing a remedy in  
15 another forum through the use of the inmate grievance process, the  
16 Court finds that he is entitled to equitable tolling during this  
17 time. Thus, the three-year statute of limitations is equitably  
18 tolled for 181 days during the time Plaintiff exhausted his  
19  
20  
21

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22 <sup>6</sup> Exhausting all administrative appeals is a prerequisite to a  
23 prisoner filing a suit which challenges the conditions of his  
24 confinement in either state or federal court. See In re Muszalski,  
25 52 Cal. App. 3d 500, 508 (1975) (prisoner challenging conditions of  
26 confinement by way of state habeas corpus petition first must  
27 exhaust the administrative remedy provided by the California  
28 Department of Corrections); 42 U.S.C. § 1997e ("No action shall be  
brought with respect to prison conditions under [42 U.S.C. § 1983],  
or any other Federal law, by a prisoner confined in any jail,  
prison, or other correctional facility until such administrative  
remedies as are available are exhausted."). See also Azer, 306  
F.3d at 936 (taking into account plaintiff's pursuit of state  
administrative and judicial remedies when finding equitable  
tolling).

1 administrative remedies from October 30, 2002 until April 29,  
2 2003. Therefore, approximately two years and eight-and-a-half  
3 months passed from April 29, 2003 until Plaintiff filed the  
4 present action on January 11, 2006. Thus, Plaintiff's action was  
5 filed within the three year limitations period, and his claim of  
6 denial of access to the courts in 2002 is timely. Accordingly,  
7 the Court DENIES Defendants' motion to dismiss on the ground that  
8 this claim is time-barred.

9  
10 In the alternative, Defendants Grannis and Hedgpeth argue  
11 (1) that Plaintiff's allegations fail to state a claim against  
12 them for their actions stemming from the October 29, 2002 incident  
13 and (2) that they are entitled to qualified immunity.

14 To state a claim for denial of access to the courts, a  
15 prisoner must prove that there was an inadequacy in the prison's  
16 legal access program that caused him an actual injury. See Lewis  
17 v. Casey, 518 U.S. 343, 350-55 (1996). To prove an actual injury,  
18 the prisoner must show that the inadequacy in the prison's program  
19 hindered his efforts to pursue a non-frivolous claim concerning  
20 his conviction or conditions of confinement. See id. at 354-55.

21  
22 A cognizable claim is stated if prison officials "actively  
23 interfer[e]" with a prisoner's access to the courts. See id. at  
24 350. However, negligence does not amount to "active interference"  
25 and thus does not rise to the level of a constitutional violation,  
26 even if it affected a prisoner's ability to present his claims in  
27 court. See id.; Daniels v. Williams, 474 U.S. 327, 333-34 (1986)  
28 (suggesting that negligent acts generally do not violate

1 constitutional rights).

2 In his amended complaint, Plaintiff alleges that Defendant  
3 Grannis handled the Director's level review of his claim that he  
4 was denied access to his two boxes of legal material. Plaintiff  
5 claims that because Defendant Grannis knew of the alleged  
6 constitutional violation and did nothing to remedy it, she is  
7 liable. The Court cannot accept as true Plaintiff's allegations  
8 that Defendant Grannis did nothing because such conclusory  
9 allegations are contradicted by documents referred to in the  
10 amended complaint. See Bell Atl. Corp., 127 S. Ct. at 1965;  
11 Durning, 815 F.2d at 1267; Lee, 250 F.3d at 688. Plaintiff has  
12 attached the Director's Level Appeal Decision, which shows that  
13 Defendant Grannis conducted a thorough review of the FLR and SLR  
14 decisions and concluded that because "appellant has failed to  
15 comply with the options provided him during the FLR, it is viewed  
16 that he has not been adversely impacted, nor have staff denied him  
17 access to his legal material." (Pl.'s Ex. A, Director's Level  
18 Appeal Decision dated Apr. 29, 2003 at 1.) While Plaintiff claims  
19 that his "requests were never responded to," (Am. Compl. at 3-E),  
20 his attachments once again contradict his conclusory allegations.  
21 Plaintiff has attached his "Basis of Opposition and  
22 Dissatisfaction to First Level Reviewers Responce [sic]," which  
23 states, "The first level reviewers['] response in theory should  
24 work but in practice it is another way and means to delay or  
25 continue to obstruct me from accessing my materials." (Pl.'s Ex.  
26 A, Pl.'s Opp'n to FLR Decision dated Dec. 28, 2002 at 1.)

1 Plaintiff fails to allege that he took advantage of the options  
2 presented to him at the FLR, which would have allowed him to  
3 access his legal materials. Instead, Plaintiff claims that he was  
4 unsuccessful when he pursued these options in the past: "appellant  
5 has also been trying to see R&R staff in order to send some tennis  
6 shoes back to the manufacturer and nothing has taken place."  
7

8 (Id.) In his opposition to the SLR's decision, Plaintiff again  
9 complains about the options presented by the FLR: "The process as  
10 set forth by the reviewers simply does not work . . . ." (Pl.'s  
11 Ex. A, Pl.'s Opp'n to SLR Decision dated Feb. 20, 2003 at 1.)

12 Plaintiff claims that the only way this alleged violation could be  
13 remedied would be for the reviewers, including Defendant Grannis,  
14 "to pick[] up the institutional telephone and personally call[]  
15 R&R staff and direct[] them to bring the appellant immediately to  
16 R&R so that he could access his legal materials . . . ." (Id.)

17 Defendant Grannis reviewed all the documents Plaintiff submitted  
18 in support of his appeal to the Director's level of review as well  
19 as the decisions at the FLR and SLR. In addition, she contacted  
20 Sergeant Mantel, who "revealed that the appellant has yet to  
21 submit a request to obtain any legal material out of either box."  
22

23 (Pl.'s Ex. A, Director's Level Appeal Decision dated Apr. 29, 2003  
24 at 1.) Based on the documents she reviewed and the information  
25 she received, Defendant Grannis declined to modify the decision at  
26 the FLR and SLR, which had provided Plaintiff a remedy. The  
27 record does not show that Plaintiff told Defendant Grannis that he  
28 had submitted a request to obtain legal material from his two

1 boxes, or that his request was denied. Even if Plaintiff had  
2 submitted such a request, Defendant Grannis cannot be liable for  
3 relying on the information from the FLR decision, the SLR decision  
4 and Sergeant Mantel. While Plaintiff alleges that Defendant  
5 Grannis's actions affected his ability to present his claims in  
6 court, even negligence does not amount to "active interference"  
7 with his access to the court and thus does not rise to the level  
8 of a constitutional violation. See Lewis, 518 U.S. at 350;  
9 Daniels, 474 U.S. at 333-34. Accordingly, the Court finds that  
10 Plaintiff fails to state a claim of denial of access to the courts  
11 against Defendant Grannis.  
12

13       Regarding Defendant Hedgpeth, Plaintiff alleges that he was  
14 designated to investigate Plaintiff's claim of denial of access to  
15 his legal materials. Defendant Hedgpeth met with Plaintiff on  
16 October 8, 2003 and told him that, according to his property card,  
17 all of his property had been issued to him. Plaintiff alleges  
18 that he then told Defendant Hedgpeth that he never received the  
19 last two boxes of legal materials. Defendant Hedgpeth said he  
20 would investigate further and that "Plaintiff would later receive  
21 a memorandum regarding the matter." (Am. Compl. at 3-E.)  
22

23 Plaintiff claims that no further action was taken by Defendant  
24 Hedgpeth; therefore, Defendant Hedgpeth "was negligent in his duty  
25 and in effect directly participated in the constitutional  
26 violations . . . ." (Id.) Thus, Plaintiff acknowledges that, at  
27 most, Defendant Hedgpeth's action constituted negligence.  
28

Furthermore, again, the Court cannot accept as true Plaintiff's



1 allegation that Defendant Hedgpeth did nothing further after the  
2 interview because this conclusory allegation is contradicted by  
3 documents referred to in the amended complaint. Attached as a  
4 document in support of his amended complaint is Defendant  
5 Hedgpeth's October 9, 2003 memorandum. (Pl.'s Ex. B., Oct. 9,  
6 2003 Memorandum by Def. Hedgpeth at 1.) Thus, contrary to  
7 Plaintiff's allegations above, Defendant Hedgpeth did get back to  
8 Plaintiff the very next day by sending him a memorandum, which  
9 stated that Defendant Hedgpeth conducted an investigation as to  
10 whether Plaintiff's boxes were being held at R&R. (Id.)  
11 Defendant Hedgpeth relied on information from Officer Archibald,  
12 who indicated that he searched R&R and found that there was no  
13 property in R&R that belonged to Plaintiff. (Id.) Based on this  
14 information, Defendant Hedgpeth stated, "There is no further  
15 remedy that I can address for you at this time." (Id.) The  
16 information Defendant Hedgpeth relied on was apparently incorrect  
17 because Plaintiff claims to have received the two missing boxes  
18 after he was transferred to another prison. (Opp'n at 1.)  
19 However, like Defendant Grannis's actions, Defendant Hedgpeth's  
20 actions, even if negligent, do not amount to a constitutional  
21 violation. See Lewis, 518 U.S. at 350; Daniels, 474 U.S. at 333-  
22 34. Accordingly, the Court finds that Plaintiff fails to state a  
23 claim of denial of access to the courts against Defendant  
24 Hedgpeth.

25  
26  
27 Even if Plaintiff had alleged a cognizable constitutional  
28 claim of denial of access to the courts, Defendants argue, he

1 fails to allege actual injury resulted, "such as the inability to  
2 meet a filing deadline or present a claim." (Reply at 4 (citing  
3 Lewis, 518 U.S. at 354-55).) Plaintiff claims that he was unable  
4 to file a habeas petition because he could not access all of his  
5 legal materials. (Am. Compl. 3-A-3-B.) However, again,  
6 Plaintiff's attachments in support of his amended complaint  
7 contradict his conclusory allegations. Plaintiff has submitted an  
8 "Order Denying Petition for Writ of Habeas Corpus" issued by the  
9 state superior court and dated June 4, 2007. (Pl.'s Not. to Court  
10 of Facts and Issues for the Record, Ex. D, June 4, 2007 Order  
11 Denying Petition for Writ of Habeas Corpus at 1-3.) Thus,  
12 Plaintiff was able to file his habeas petition prior to November  
13 16, 2007, the date his two missing boxes were returned to him.  
14 The superior court order addressed Plaintiff's claims on the  
15 merits and did not dismiss them as being untimely. (Id.)  
16 Therefore, the Court finds that Plaintiff's claim of denial of  
17 access to the courts against Defendants Grannis and Hedgpeth fails  
18 for the additional reason that his conclusory allegation that the  
19 violation resulted in actual injury is contradicted by the fact  
20 that he was able to file a habeas petition even though he did not  
21 have access to all of his legal materials.  
22

23  
24 Accordingly, Defendants' motion to dismiss is GRANTED, and  
25 the complaint is DISMISSED. Because the Court has granted  
26 Defendants' motion to dismiss as to all of Plaintiff's claims, it  
27 need not address Defendants' argument that they are entitled to  
28 qualified immunity. Plaintiff had already amended once before

1 service and his amended complaint fails to allege a constitutional  
2 violation; therefore, the dismissal is without further leave to  
3 amend. See Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th  
4 Cir. 1994) (futility grounds to deny leave to amend).

5  
6 CONCLUSION

7 For the foregoing reasons,

8 1. Plaintiff's claims against Defendant Younce are  
9 DISMISSED pursuant to Federal Rule of Civil Procedure 25(a)(1).

10 2. Defendants' motion to dismiss (docket no. 51) is  
11 GRANTED, and the complaint is DISMISSED without further leave to  
12 amend.

13 3. The Clerk shall enter judgment, terminate all pending  
14 motions, including Plaintiff's motions to compel and for  
15 appointment of counsel (docket nos. 65 and 74), and close the  
16 file. Each party shall bear his or her own costs.

17 4. Plaintiff has filed a notice relating to obstruction of  
18 the filing of an action in the United States District Court for  
19 the Eastern District of California. If Plaintiff seeks to bring  
20 an action in federal court about the conditions of confinement at  
21 the California State Prison - Corcoran, he must file a civil  
22 rights complaint under 42 U.S.C. § 1983 in the Eastern District of  
23 California.  
24

25 5. This Order terminates Docket nos. 51, 65 and 74.

26 IT IS SO ORDERED.

27 DATED: 3/24/09



28 \_\_\_\_\_  
CLAUDIA WILKEN

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 BRIAN K. BARNETT,

5 Plaintiff,

6 v.

7 MICHAEL EVANS et al,

8 Defendant.  
9 \_\_\_\_\_/

Case Number: CV06-00193 CW

**CERTIFICATE OF SERVICE**

10  
11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
12 Court, Northern District of California.

13 That on March 24, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said  
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
16 located in the Clerk's office.

17  
18 Brian Keith Barnett T-38323  
19 Facility 4A2R-005L  
20 California State Prison-Corcoran SHU  
21 4001 King Ave.  
22 P.O. Box 3476  
23 Corcoran, CA 93212-3476

24 Dated: March 24, 2009

25 Richard W. Wieking, Clerk  
26 By: Sheilah Cahill, Deputy Clerk  
27  
28