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2
3 IN THE UNITED STATES DISTRICT COURT
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 JOSEPH J. FLOWERS,

No. 08-04179 CW

6 Plaintiff,

ORDER DISMISSING
SECOND AMENDED
COMPLAINT WITH
LEAVE TO AMEND
AND ORDER DENYING
MOTION FOR THREE-
JUDGE PANEL
(Docket # 26)

7 v.

8 ALAMEDA COUNTY SHERIFF GREGORY AHERN,
9 et al.,

10 Defendants.

11
12 Plaintiff Joseph J. Flowers, a state inmate currently
13 incarcerated at the Marin County jail, has filed this civil rights
14 action concerning events that took place when he was a pretrial
15 detainee in the Alameda County Jail.¹ On February 3, 2010, the
16 Court issued a Second Order of Dismissal with Leave to Amend in
17 which it noted that, in his original complaint, Plaintiff attempted
18 to state claims against employees of the Alameda County Sheriff's
19 Department, the Marin County Sheriff's Department, the Sacramento
20 County Sheriff's Department and the Oakland Police Department. The
21 Court ruled that Plaintiff's Second Amended Complaint (SAC) may
22 include only claims against the named Defendants from the Alameda
23 County Sheriff's Department and that, if he wished to pursue claims
24 against employees of other law enforcement agencies, he must bring
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26
27 ¹Plaintiff does not explicitly state he was a pretrial
28 detainee at the time of the events giving rise to his claims.
However, the Court infers this from the allegations in his Second
Amended Complaint.

1 those claims in separate lawsuits.² The Court also explained that,
2 in an SAC, Plaintiff must allege facts showing what each named
3 Defendant did that violated his constitutional rights and, if
4 Plaintiff claimed that any of the Defendants were liable as
5 supervisors, he must allege that they "participated in or directed
6 the violations, or knew of the violations and failed to act to
7 prevent them." On March 3, 2010, Plaintiff filed this SAC.

8 BACKGROUND

9 In the captions of his original and first amended complaints,
10 Plaintiff named Alameda County Sheriff Gregory J. Ahern and other
11 individuals defendants. However, in the caption of his SAC, he
12 only names Sheriff Ahern and indicates other individuals by use of
13 "et al." The use of "et al." in the caption of a complaint fails
14 to provide notice to the individuals who are being sued.
15 Therefore, for this reason alone, the SAC must be dismissed with
16 leave to amend for Plaintiff to name each individual he is suing in
17 the caption of the amended complaint. The Court now reviews the
18 SAC.

19 In his SAC, Plaintiff divides his factual allegations into the
20 following eight claims.

21 I. Claim One

22 From March 20, 2007 to August 2, 2007 and from May 13, 2008 to
23 August 22, 2008, Plaintiff was placed in Administrative Segregation
24 (AS) without judicial review or notice of any violations which
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26 ²For this reason, among others, the Court denies Plaintiff's
27 motion for a three-judge panel to order his release from the Marin
28 County jail. (Docket # 26).

1 warranted placing him in AS. Plaintiff alleges that Deputies
2 Jones, Smith and Delima refused to file his grievances about being
3 placed in AS. Plaintiff alleges that Sheriff Gregory Ahern
4 participated in, supervised or directed this unlawful conduct and
5 implemented the policy which allowed it to occur. Plaintiff brings
6 this claim against Sheriff Ahern and Deputies Smith, C. Delima and
7 Jones and mentions other defendants who are unknown at this time.
8 As indicated above, only Sheriff Ahern is named in the caption of
9 the SAC.

10 II. Claim Two

11 On August 3, 2007, Plaintiff gave two pieces of legal mail to
12 the "out going mail personal person," who assured him that the mail
13 would be shipped out soon. After Plaintiff had not heard from the
14 court, he filled out a form to request a search for lost mail. He
15 learned that his legal mail had been opened and the contents had
16 been misplaced. As a result, a court ruling in his case was
17 affected. Sheriff Ahern is responsible for the policy and
18 procedures that allowed Plaintiff's mail to be opened and its
19 contents to be lost. Plaintiff brings this claim against Sheriff
20 Ahern and mentions deputies who are unknown at this time.

21 III. Claim Three

22 On August 2, 2007, Plaintiff was transferred from North County
23 jail to Santa Rita jail. Upon arriving at Santa Rita jail,
24 Plaintiff, who was wearing red clothing, was placed in a cell with
25 two inmates who were dressed in yellow clothing. The colors
26 represent segregation status and inmates wearing different colored
27 clothing are not to be placed in cells together. The two inmates
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1 dressed in yellow clothes took possession of Plaintiff's legal
2 materials, ripped them up and flushed them down the toilet. The
3 legal materials were hard copies of Plaintiff's criminal appeal.
4 Also, these inmates physically abused Plaintiff. Deputy Fisher
5 witnessed this incident and could have prevented Plaintiff's abuse
6 and the destruction of his legal materials, but she did nothing to
7 prevent it. Plaintiff brings this claim against Sheriff Ahern and
8 Deputy Fisher and mentions other unknown deputies. As indicated
9 above, only Sheriff Ahern is named in the caption of the SAC.

10 IV. Claim Four

11 On May 13, 2008, Plaintiff was arrested³ and taken to Santa
12 Rita jail for routine booking. He was placed in handcuffs, taken
13 to a closed-off section of the jail and beaten by several Sheriff's
14 deputies. After the incident, Plaintiff was told not to report it.
15 As a result of the beating, Plaintiff suffers from head, neck and
16 back pain, hip problems and right wrist problems. Plaintiff brings
17 this claim against Sheriff Ahern and mentions deputies who are
18 unknown at this time.

19 V. Claim Five

20 On May 13, 2008, as a result of the above-mentioned assault,
21 Plaintiff needed medical treatment, but the deputies, who knew of
22 Plaintiff's need for medical treatment, refused to allow him to see
23 a medical practitioner. Plaintiff was also not allowed to have
24 physical therapy. Because of his lack of medical treatment,
25 Plaintiff re-injured himself when he tried to walk up and down

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27 ³It appears that Plaintiff was arrested twice during the time
28 period covered by the SAC.

1 flights of stairs. Sheriff Ahern's policies and procedures allowed
2 his deputies to ignore Plaintiff's need for medical attention.

3 Plaintiff brings this claim against Sheriff Ahern and Deputies
4 Jones, Smith, J. DeLeon, C. Nelson, C. Delima, R. Kull and A.
5 Valvedia. Only Sheriff Ahern is named in the caption of the SAC.
6 Plaintiff also mentions other deputies who are unknown at this
7 time.

8 VI. Claim Six

9 On July 28, 2008, Plaintiff was harassed by being repeatedly
10 strip searched without cause. Also, Deputies Smith, J. DeLeon, C.
11 Delima and H.C. McGinness made verbal remarks about Plaintiff's
12 private parts in the presence of female nurses and other inmates
13 and repeatedly made fun of, humiliated and embarrassed Plaintiff.
14 As a result, Plaintiff suffered severe emotional pain and
15 suffering. Sheriff Ahern is also responsible.

16 Plaintiff brings this claim against Sheriff Ahern and Deputies
17 Smith, DeLeon, Delima and McGinness. Only Sheriff Ahern is named
18 in the caption of the SAC.

19 VII. Claim Seven

20 On August 21, 2008, Deputy W. Posey escorted Plaintiff from
21 his cell to a medical appointment. Deputy Posey intentionally
22 failed to secure Plaintiff's cell so that other inmates or deputies
23 could enter his cell while he was gone and tamper with Plaintiff's
24 legal documents and other personal property. Several of these
25 legal documents were never returned to Plaintiff, which deprived
26 him of his right to fair access to the courts. On July 10, 2008,
27 Plaintiff forwarded to Deputy McNeill legal documents to be copied.

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1 However, Deputy McNeill never returned these legal documents to
2 Plaintiff. Plaintiff brings this claim against Deputies Posey and
3 McNeill, who are not named in the caption of the SAC.

4 VIII. Claim Eight

5 From May 13, 2008 to October 1, 2008, the food Plaintiff was
6 served was tampered with. For instance, Plaintiff was served beans
7 with several metal objects, causing Plaintiff to choke. Some of
8 the food served to Plaintiff was spoiled. Plaintiff found bugs on
9 his food tray, put them in an envelope and gave them to Deputy C.
10 Nelson for safe-keeping. Although Deputy Nelson promised to return
11 the envelope to Plaintiff, he never did so. Sheriff Ahern's
12 policies allowed the food-tampering. Plaintiff brings this claim
13 against Sheriff Ahern and Deputy Nelson, who is not named in the
14 caption. Plaintiff also mentions other deputies who are unknown at
15 this time.

16 Plaintiff alleges that he has "filed and exhausted all legal
17 county grievances allowed at the time of incarceration." For this
18 initial review, the Court will accept these allegations as stating
19 that Plaintiff has exhausted administrative remedies.

20 DISCUSSION

21 I. Review Under 28 U.S.C. § 1915A(a)

22 A federal court must conduct a preliminary screening in any
23 case in which a prisoner seeks redress from a governmental entity
24 or officer or employee of a governmental entity. 28 U.S.C.
25 § 1915A(a). In its review, the court must identify any cognizable
26 claims and dismiss any claims that are frivolous, malicious, fail
27 to state a claim upon which relief may be granted or seek monetary
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1 relief from a defendant who is immune from such relief. 28 U.S.C.
2 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
3 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
4 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must
6 allege two essential elements: (1) that a right secured by the
7 Constitution or laws of the United States was violated, and
8 (2) that the alleged violation was committed by a person acting
9 under the color of State law. West v. Atkins, 487 U.S. 42, 48
10 (1988).

11 II. Unnamed Defendants

12 Plaintiff purports to sue sheriff's deputies who are unknown
13 at this time. In situations where the identity of alleged
14 defendants cannot be known prior to the filing of a complaint, the
15 plaintiff should be given an opportunity through discovery to
16 identify the unknown defendants, unless it is clear that discovery
17 would not uncover their identities or that the complaint should be
18 dismissed on other grounds. Gillespie v. Civiletti, 629 F.2d 637,
19 642 (9th Cir. 1980); Velasquez v. Senko, 643 F. Supp. 1172, 1180
20 (N.D. Cal. 1986). Accordingly, the claims against unnamed
21 defendants are DISMISSED without prejudice. If Plaintiff discovers
22 any or all of their identities while this action is pending and can
23 in good faith assert facts alleging constitutionally cognizable
24 claims for relief against them, he may move for leave to amend his
25 complaint to add them as named Defendants.

26 III. Administrative Segregation -- Claim One

27 When a pretrial detainee challenges conditions of his
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1 confinement, the proper inquiry is whether the conditions amount to
2 punishment in violation of the Due Process Clause of the Fourteenth
3 Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

4 "'[T]he State does not acquire the power to punish with which the
5 Eighth Amendment is concerned until after it has secured a formal
6 adjudication of guilt in accordance with due process of law.'" Id.
7 (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)).

8 The state may detain a pretrial detainee "to ensure his
9 presence at trial and may subject him to the restrictions and
10 conditions of the detention facility so long as those conditions
11 and restrictions do not amount to punishment or otherwise violate
12 the Constitution." Id. at 536-37. If a particular condition or
13 restriction of pretrial detention is reasonably related to a
14 legitimate governmental objective, it does not, without more,
15 amount to "punishment." Id. at 539. To determine whether
16 particular restrictions and conditions accompanying pretrial
17 detention amount to punishment in the constitutional sense of the
18 word, the court first looks to whether the disability imposed is
19 for the purpose of punishment or whether it is but an incident of
20 some other legitimate governmental purpose. Id. at 538. For
21 example, states must be able to maintain security and order at
22 pretrial facilities, and restraints that are reasonably related to
23 an interest in maintaining jail security are not, without more,
24 unconstitutional punishment. Id. at 540.

25 Even though pretrial detainees' claims arise under the Due
26 Process Clause, the Ninth Circuit has determined that the
27 appropriate standard of review for evaluating constitutional claims
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1 of pretrial detainees is the same one used to evaluate convicted
2 prisoners' claims under the Eighth Amendment. Carnell v. Grimm, 74
3 F.3d 977, 979 (9th Cir. 1996). "The requirement of conduct that
4 amounts to 'deliberate indifference' provides an appropriate
5 balance of the pretrial detainees' right to not be punished with
6 the deference given to prison officials to manage the prisons."
7 Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991)
8 (en banc). Disciplinary segregation as punishment for violation of
9 jail rules and regulations cannot be imposed without due process,
10 i.e., without complying with the procedural requirements of Wolff
11 v. McDonnell, 418 U.S. 539 (1974). Mitchell v. Dupnik, 75 F.3d
12 517, 523-26 (9th Cir. 1996).

13 Plaintiff's allegations that he was placed in administrative
14 segregation without notice or any administrative review process is
15 sufficient to state a due process violation claim against Deputies
16 Smith, Delima and Jones. However, they cannot be served until
17 Plaintiff submits an amended complaint listing them in the caption.
18 Plaintiff's allegation that Sheriff Ahern's policies and procedures
19 allowed the due process violation is sufficient to state a
20 cognizable claim against him.

21 IV. Legal Mail -- Claim Two

22 Prisoners enjoy a First Amendment right to send and receive
23 mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing
24 Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). A prison,
25 however, may adopt regulations or practices which impinge on a
26 prisoner's First Amendment rights as long as the regulations are
27 "reasonably related to legitimate penological interests." Turner

1 v. Safley, 482 U.S. 78, 89 (1987). Prison officials may institute
2 procedures for inspecting "legal mail," e.g., mail sent between
3 attorneys and prisoners, see Wolff v. McDonnell, 418 U.S. 539, 576-
4 77 (1974) (incoming mail from attorneys), and mail sent from
5 prisoners to the courts, see Royse v. Superior Court, 779 F.2d 573,
6 574-75 (9th Cir. 1986) (outgoing mail to court). But the opening
7 and inspecting of "legal mail" outside the presence of the prisoner
8 may have an impermissible "chilling" effect on the constitutional
9 right to petition the government. O'Keefe v. Van Boening, 82 F.3d
10 322, 325 (9th Cir. 1996) (citing Laird v. Tatum, 408 U.S. 1, 11
11 (1972)). If so, prison officials must establish that legitimate
12 penological interests justify the policy or practice. O'Keefe, 82
13 F.3d at 327. Generally, "legal mail" may not be read or copied
14 without the prisoner's permission. Casey v. Lewis, 43 F.3d 1261,
15 1269 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343 (1996).
16 But again, prison officials may establish that legitimate
17 penological interests justify the policy or practice. O'Keefe, 82
18 F.3d at 327.

19 Plaintiff's allegations in claim two are sufficient to state a
20 cognizable First Amendment claim against Sheriff Ahern for the
21 policy and procedures that interfered with Plaintiff's receipt of
22 his mail.

23 V. Attack By Other Inmates -- Claim Three

24 The Eighth Amendment requires that prison officials take
25 reasonable measures to guarantee the safety of prisoners. Farmer
26 v. Brennan, 511 U.S. 825, 832 (1994). In particular, prison
27 officials have a duty to protect prisoners from violence at the

1 hands of other prisoners. Id. at 833; Hearns v. Terhune, 413 F.3d
2 1036, 1040 (9th Cir. 2005). The failure of prison officials to
3 protect inmates from attacks by other inmates or from dangerous
4 conditions at the prison violates the Eighth Amendment only when
5 two requirements are met: (1) the deprivation alleged is,
6 objectively, sufficiently serious; and (2) the prison official is,
7 subjectively, deliberately indifferent to inmate safety. Farmer,
8 511 U.S. at 834; Hearns, 413 F.3d at 1040-41.

9 The allegations in claim three are sufficient to state a
10 cognizable claim against Deputy Fisher for deliberate indifference
11 to Plaintiff's safety. However, Deputy Fisher cannot be served
12 until Plaintiff submits an amended complaint with her name in the
13 caption. Plaintiff fails to allege any conduct by Sheriff Ahern
14 that violated his constitutional rights. Therefore, this claim
15 against Sheriff Ahern is dismissed.

16 VI. Beatings by Deputies -- Claim Four

17 The treatment a prisoner receives in prison and the conditions
18 under which he is confined are subject to scrutiny under the Eighth
19 Amendment. Helling v. McKinney, 509 U.S. 25, 31 (1993). "After
20 incarceration, only the unnecessary and wanton infliction of pain
21 . . . constitutes cruel and unusual punishment forbidden by the
22 Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319 (1986)
23 (ellipsis in original). A pretrial detainee is protected from the
24 use of excessive force by the Due Process Clause of Fourteenth
25 Amendment, which is construed in the same way as the Eighth
26 Amendment's proscription against cruel and unusual punishment.
27 Graham v. Connor, 490 U.S. 386, 395 n.10. (1989); Carnell, 74 F.3d

1 at 979. A prison official violates the Eighth Amendment when two
2 requirements are met: (1) the deprivation alleged must be,
3 objectively, sufficiently serious, Farmer, 511 U.S. at 834 (citing
4 Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and (2) the prison
5 official must possess a sufficiently culpable state of mind, i.e.,
6 the offending conduct must be wanton, id. (citing Wilson, 501 U.S.
7 at 297); LeMaire v. Maass, 12 F.3d 1444, 1451 (9th Cir. 1993).

8 The allegations in claim four state a cognizable cause of
9 action for excessive force. However, Plaintiff fails to name any
10 individuals who participated in these beatings, nor does he mention
11 any conduct by Sheriff Ahern that implicates him in the
12 constitutional violation. Therefore, this claim is dismissed with
13 leave to move to amend should Plaintiff learn the identities of the
14 deputies who took part in the physical abuse of Plaintiff.

15 VII. Deliberate Indifference to Serious Medical Needs -- Claim Five

16 Deliberate indifference to serious medical needs violates the
17 Eighth Amendment's proscription against cruel and unusual
18 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin
19 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other
20 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th
21 Cir. 1997) (en banc). A pre-trial detainee's claim for deliberate
22 indifference to medical needs derives from the due process clause
23 rather than the Eighth Amendment's protection against cruel and
24 unusual punishment. Gibson v. County of Washoe, 290 F.3d 1175,
25 1187 (9th Cir. 2002) (citing Bell, 441 U.S. at 535). A
26 determination of "deliberate indifference" involves an examination
27 of two elements: the seriousness of the prisoner's medical need and
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1 the nature of the defendant's response to that need. McGuckin, 974
2 F.2d at 1059.

3 The allegations in claim five are sufficient to state a
4 cognizable claim for deliberate indifference to Plaintiff's serious
5 medical needs. However, although Plaintiff names Deputies Jones,
6 Smith, DeLeon, Nelson, Delima, Kull and Valvedia in the body of
7 this claim, he fails to allege the conduct of each individual
8 deputy that violated his constitutional rights. Therefore, this
9 claim is dismissed against these deputies with leave to amend to
10 remedy this deficiency and to include them in the caption of the
11 complaint. The allegation that Sheriff Ahern's policies and
12 procedures enabled the individual deputies to violate Plaintiff's
13 constitutional right to receive medical treatment for serious
14 medical needs is insufficient to state a cognizable claim against
15 him. This claim against him is dismissed with leave to amend, if
16 he can correct this deficiency.

17 VIII. Strip Searches -- Claim Six

18 Incarcerated prisoners retain a limited right to bodily
19 privacy. Michenfelder v. Sumner, 860 F.2d 328, 333 (9th Cir.
20 1988). Shielding one's unclothed figure from the view of
21 strangers, particularly strangers of the opposite sex, is impelled
22 by elementary self-respect and personal dignity. Grummett v.
23 Rushen, 779 F.2d 491, 494 (9th Cir. 1985). Prisoners and pretrial
24 detainees in institutional settings may be subjected to strip
25 searches and body cavity searches if they are conducted in a
26 reasonable manner. Bell, 441 U.S. at 561 (1979). The Fourth
27 Amendment right to be secure against unreasonable searches extends
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1 to incarcerated prisoners, although the reasonableness of a
2 particular search must be determined by reference to the prison
3 context. Michenfelder, 860 F.2d at 332.

4 The allegations in claim six regarding repeated strip searches
5 state a cognizable cause of action for unreasonable search and
6 seizure. However, Plaintiff does not name the deputy who
7 repeatedly strip-searched him, nor does he mention any conduct by
8 Sheriff Ahern that implicates him in the constitutional violation.
9 The claim is dismissed with leave to move to amend should Plaintiff
10 learn the identity of the deputy who strip-searched him. The other
11 allegations in claim six that deputies engaged in verbal conduct
12 are insufficient to state a cognizable constitutional claim. See
13 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (verbal
14 harassment or abuse is insufficient to amount to a constitutional
15 deprivation). Therefore, the claim based on verbal harassment is
16 dismissed without leave to amend.

17 IX. Access to the Courts -- Claim Seven

18 State prisoners have a constitutional right of access to the
19 courts. Lewis v. Casey, 518 U.S. 343, 350 (1996). To state a
20 claim for a violation of the right of access to the courts, a
21 prisoner must allege conduct on the part of the defendant that
22 deprived him of access and show that he or she suffered from an
23 actual injury as a result of that deprivation. Id. at 351. Actual
24 injury means that the prisoner's pursuit of a legal claim was
25 hindered or prevented. Id.

26 Plaintiff's allegations that Deputy McNeill did not return
27 legal documents to him and that Deputy Posey allowed other deputies

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1 to steal Plaintiff's legal documents fail to state a claim because
2 he does not allege that these actions impeded his pursuit of a
3 legal cause of action. This claim is dismissed with leave to move
4 to amend to include such allegations, if he truthfully can do so,
5 and to name these deputies in the caption of his complaint.

6 An unauthorized intentional deprivation of property by a state
7 employee is not a violation of a prisoner's due process rights if
8 the state provides a meaningful post-deprivation remedy for the
9 loss. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

10 Plaintiff's allegations that Deputy Posey allowed other
11 deputies to take personal property from Plaintiff's cell do not
12 state a due process claim because the California legislature has
13 provided a remedy for tort claims against public officials. See
14 Blueford v. Puntly, 108 F.3d 251, 256 (9th Cir. 1997); Barnett v.
15 Kenton, 31 F.3d 813, 186-17 (9th Cir. 1994) (California provides
16 prisoners an adequate post-deprivation remedy for any property
17 deprivations under California Government Code §§ 900 et seq., the
18 California Tort Claims Act); Rider v. Felker, 2010 WL 458915, *4
19 (E.D. Cal. 2010) (same). This claim is dismissed without leave to
20 amend.

21 X. Food Tampering -- Claim Eight

22 Adequate food is a basic human need protected by the Eighth
23 Amendment. Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996),
24 amended, 135 F.3d 1318 (9th Cir. 1998). The Eighth Amendment
25 requires only that prisoners receive food that is adequate to
26 maintain health; it need not be tasty or aesthetically pleasing.
27 LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993).

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1 Nutritionally complete food served to inmates is deficient under
2 constitutional standards, however, if it is prepared under
3 conditions so unsanitary as to make it unwholesome and a threat to
4 inmates who consume it. Toussaint v. McCarthy, 597 F. Supp. 1388,
5 1412 (N.D. Cal. 1984); cf. LeMaire, 12 F.3d at 1456 ("[t]he fact
6 that the food occasionally contains foreign objects or sometimes is
7 served cold, while unpleasant, does not amount to a constitutional
8 deprivation"). Food that is spoiled and water that is foul would
9 be inadequate to maintain health. Keenan, 83 F.3d at 1091.

10 The allegations in claim eight state a cognizable Fourth
11 Amendment claim for ongoing tampering with Plaintiff's food so as
12 to make it a threat to his safety. Plaintiff's allegations state a
13 cognizable claim against Sheriff Ahern. However, the allegation
14 that Deputy Nelson refused to return to Plaintiff an envelope that
15 contained bugs found in his food is insufficient to state a claim
16 against him. Therefore, this claim against Deputy Nelson is
17 dismissed without leave to amend.

18 CONCLUSION

19 For the foregoing reasons, the Court orders as follows:

20 1. All claims against unnamed defendants are dismissed with
21 leave to move to amend if Plaintiff learns their identity through
22 the discovery process.

23 2. Plaintiff's claims one, two, and eight are cognizable
24 against Sheriff Ahern.

25 3. Plaintiff's claim one states a cognizable claim against
26 Deputies Smith, Delima and Jones. However, they cannot be served
27 until Plaintiff submits an amended complaint with their names

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1 included in the caption.

2 4. Plaintiff's claim three states a cognizable claim against
3 Deputy Fisher. However, she cannot be served until Plaintiff
4 submits an amended complaint with her name in the caption.

5 5. Plaintiff's claim four is dismissed with permission to move
6 for leave to amend if Plaintiff learns the identities of the
7 individuals who violated his right to be free from excessive force.

8 6. Plaintiff's claim five against Sheriff Ahern and Deputies
9 Jones, Smith, DeLeon, Nelson, Delima, Kull and Valvedia is
10 dismissed with leave to amend to add allegations of each
11 individual's conduct that constituted deliberate indifference to
12 Plaintiff's serious medical needs.

13 7. Plaintiff's claim six regarding strip searches is dismissed
14 with permission to move for leave to amend if Plaintiff learns the
15 identity of the individual who repeatedly strip-searched him. The
16 claim against Deputies Smith, DeLeon, Delima and McGinness based on
17 verbal conduct is dismissed without leave to amend.

18 8. Plaintiff's claim seven against Deputy Posey for
19 intentionally allowing other deputies to take Plaintiff's legal
20 mail and against Deputy McNeill for not returning legal documents
21 is dismissed with leave to amend to allege that these actions
22 impeded his pursuit of a specific legal claim, if he truthfully can
23 do so. The claim against Deputy Posey, to the extent it is based
24 on allegations of the taking of Plaintiff's personal property, is
25 dismissed without prejudice to pursuing in state court.

26 9. Plaintiff's claim eight states a cognizable cause of action
27 against Sheriff Ahern, but is dismissed against Deputy Nelson

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1 without leave to amend.

2 10. Plaintiff is given thirty days from the date of this Order
3 to submit a third amended complaint (TAC) which should include in
4 the caption, in addition to Sheriff Ahern, the names of all
5 defendants against whom Plaintiff has alleged cognizable claims:
6 Deputies Smith, Delima, Jones, Fisher, DeLeon, Nelson, Kull,
7 Valvedia, Posey and McNeill. In the TAC, Plaintiff may amend claim
8 five for deliberate indifference to serious medical needs and claim
9 seven for lack of access to the courts, if he truthfully can do so.
10 If Plaintiff does not submit an amended complaint within thirty
11 days, only Sheriff Ahern will be served with an order to answer the
12 cognizable claims against him.

13 11. It is Plaintiff's responsibility to prosecute this case.
14 Plaintiff must keep the Court informed of any change of address and
15 must comply with the Court's Orders in a timely fashion. Failure
16 to do so may result in the dismissal of this action for failure to
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

18 12. Plaintiff's motion for a three judge panel to order his
19 release from the Marin County jail (docket no. 26) is denied.

20
21 IT IS SO ORDERED.

22
23 Dated: June 3, 2010



CLAUDIA WILKEN
United States District Judge

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

4 JOSEPH J. FLOWERS,
5 Plaintiff,

Case Number: CV08-04179 CW

CERTIFICATE OF SERVICE

6 v.

7 ALAMEDA COUNTY SHERIFF et al,
8 Defendant.

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

11 That on June 3, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
14 office.

15 Joseph J. Flowers
16 Marin County Jail
17 13 Peter Behr Dr.
18 San Rafael, CA 94903

Dated: June 3, 2010

Richard W. Wiekling, Clerk
By: Ronnie Hersler, Adm Law Clerk