UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RODNEY WAYNE JONES, CDCR #D-55894,

Plaintiff,

vs.

STUART J. RYAN, et al.,

Defendants.

Civil No. 07-1019 J JMA

ORDER:

(1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS;

(2) DISMISSING DEFENDANTS TORRES AND BAILEY PURSUANT TO FED.R.CIV.P. 4(m); AND

(3) ORDERING REMAINING DEFENDANTS TO FILE AN ANSWER TO THE REMAINING CLAIMS

[Doc. Nos. 63, 95]

Plaintiff, an inmate currently incarcerated at California State Prison located in Corcoran, California, and proceeding pro se, has filed a First Amended Complaint ("FAC") pursuant to 42 U.S.C. § 1983 [Doc. No. 59]. Defendants Ryan, Ochoa, Jimenez, Zills, Schommer, Ortiz, Rodiles, Mejia, Sandoval, Wells, Castaneda, Cosio, Flores, Ritter, Bell, Anadalon, Harmon, Duarte, Stratton, Price, Martinez, Valenzuela and Rangel have filed Motions to Dismiss

Plaintiff's First Amended Complaint pursuant to FED.R.CIV. P. 12(b)(6) [Doc. Nos. 63, 95]. [1] In addition, Defendant Pegues has filed a Notice of Joinder and Joinder to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint [Doc. No. 64].

Because Defendants filed two Motions to Dismiss, one was filed after a number of newly named Defendants had been served, Plaintiff has filed two Oppositions [Doc. Nos. 80, 96] to which Defendants have filed a Reply [Doc. No. 83].

I.

PLAINTIFF'S FACTUAL ALLEGATIONS

In 2005 Plaintiff was housed at Centinela State Prison which is located in Imperial County. (*See* FAC at 1.) On June 10, 2005, Plaintiff was awakened by his cell door being pushed open and saw Defendants Schommer and Ortiz standing in front of his cell. (*Id.* at ¶¶ 1-2.) Defendant Schommer told Plaintiff it was "count time" and Plaintiff informed Defendant Schommer that he had fallen asleep because he was taking pain medication. (*Id.* at ¶¶ 3-4.) Defendants Schommer and Ortiz walked away from Plaintiff's cell as Defendants Torres and Mejia approached. (*Id.* at ¶¶ 6-7.) Defendant Wells closed Plaintiff's cell door from the control tower. (*Id.* at ¶ 8). Defendants Schommer, Ortiz and Torres told Defendant Wells to reopen Plaintiff's cell. (*Id.* at ¶ 12.) Defendants Schommer and Torres entered Plaintiff's cell and began to simultaneously use oleresin capsicum (also known as " pepper spray") on Plaintiff who was not resisting. (*Id.* at ¶¶ 14-18.)

While Plaintiff was shielding his face, he was struck on the lower left leg with a baton by either Defendant Torres or Schommer and then struck on the right temple by Defendant Torres. (*Id.* at ¶¶ 20-21.) Defendant Castaneda then entered Plaintiff's cell and placed Plaintiff in handcuffs. (*Id.* at ¶ 22.) Defendant Castaneda then took Plaintiff to the shower in order to "decontaminate" Plaintiff from the pepper spray but instead of using cold water, which is required by regulations, Defendant Castaneda used hot water which caused Plaintiff's skin to

[1] While this matter was referred to Magistrate Judge Jan M. Adler , for disposition pursuant to 28 U.S.C. § 636(b)(1)(A) and S.D. CAL. CIVLR 72.3, the Court has determined that a Report and Recommendation regarding Defendants' Motions to Dismiss is unnecessary. *See* S.D. CAL. CIVLR 72.3(a).

burn. (*Id.* at ¶¶ 23- 25.) Defendant Zills entered the shower area and began pushing Plaintiff to the exit of the housing unit by his handcuffs. (*Id.* at ¶¶ 27-28.) While exiting through the corridor area, Defendant Zills "ran Plaintiff face first into the corridor's brick wall." (*Id.* at ¶ 29.) Plaintiff was then "slammed to the ground" by Defendants Zills and Torres. (*Id.* at ¶ 31.) As Defendant Zills held Plaintiff, "Defendants Torres, Ortiz and Rodiles proceeded to take turns striking Plaintiff in the head and body utilizing their state-issued side handle batons." (*Id.* at ¶ 32.) As Defendant Zills continued to hold Plaintiff, Defendant Mejia "walked over and kicked Plaintiff." (*Id.* at ¶ 35.) In addition, Defendant Sandoval began "viciously [kicking] Plaintiff" in his chest "with enough force that [caused] Plaintiff to temporarily stop breathing." (*Id.* at ¶ 37.) Defendant Castaneda began to yell in Spanish "that's it." (*Id.* at ¶ 39.) Plaintiff claims that Defendants Castaneda, Jimenez, Bailey, Cosio, Bell and Andalon "observed Plaintiff being maliciously and wantonly beaten" but failed to intervene. (*Id.* at ¶ 40.)

Defendants placed Plaintiff in the shower to remove any signs of blood and then proceeded to take Plaintiff to the medical clinic by Defendants Torres, Jimenez and Bell. (*Id.* at ¶ 42-44.) Plaintiff claims that Defendants Jimenez and Torres "intentionally [delayed] Plaintiff from receiving medical evaluation and treatment" by keeping Plaintiff in a holding cell for two hours inside the medical clinic. (*Id.* at ¶¶ 46-47.) Plaintiff was later examined by medical staff and it was determined that he should be seen by the prison's physician. (*Id.* at ¶ 50.) While Plaintiff was waiting to be seen by the prison's physician he claims that Defendants Harmon and Duarte made "obscene/vulgar statements directed at Plaintiff." (*Id.* at ¶¶ 53-54.) Plaintiff was examined by "Doctor Naz," the prison's physician, who "sutured Plaintiff's three scalp lacerations and one left leg laceration and evaluated plaintiff as having a possible liver rupture and chest wall contusion." (*Id.* at ¶ 56.) Defendants Stratton and Mejia videotaped Plaintiff's injuries. (*Id.* at ¶ 57.) Defendants Ryan, Ochoa and Pegues arrived soon after and asked Plaintiff's questions regarding the incidents that led to his injuries. (*Id.* at ¶ 58.)

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Doctor Naz recommended that Plaintiff be immediately transferred to Pioneer Memorial Hospital ("PMH") due to his potentially "life-threatening injuries." (*Id.* at ¶ 60.) Defendants Ryan, Ochoa, Pegues and Stratton "refused to act or expedite Plaintiff's transfer to PMH and instead intentionally allowed Plaintiff's suffering condition to deteriorate." (*Id.* at ¶ 61.) At approximately 4:34 a.m. on June 11, 2005, Plaintiff was transferred to the PMH emergency room. (*Id.* at ¶ 63.) Plaintiff underwent medical examinations and testing where it was determined that he suffered from a "punctured and collapsed right lung, a minimum of four broken right ribs, three severe scalp lacerations, one left leg laceration, and multiple abrasions, bruising and swelling throughout Plaintiff's body." (*Id.* at ¶ 65.) Plaintiff claims Defendants Jimenez, Torres, Schommer, Ortiz, Zills, Rodiles, Wells, Flores and Ritter submitted "fabricated disciplinary reports against Plaintiff" to "conceal" their own misconduct. (*Id.* at ¶¶ 68-70.) Defendant Flores submitted a report indicating that he had discovered an inmate manufactured weapon in Plaintiff's cell which Plaintiff claims is a false accusation. (*Id.* at ¶ 71.)

Plaintiff was charged with disciplinary violations including assault on staff, battery on staff, battery on a Peace Officer with a weapon and attempted murder of a Peace Officer. (*Id.* at ¶ 73.) Plaintiff also claims that his property was taken by Defendants in retaliation for Plaintiff's allegations against Defendants. (*Id.* at ¶¶ 93-95.) To date, Plaintiff has yet to receive a disciplinary hearing on the rules violation report that was issued to him charging Plaintiff with attempted murder of a Peace Officer. (*Id.* at ¶ 100.) However, Plaintiff does indicate that he is being temporarily housed at Calipatria State Prison "pending court proceedings in Imperial County Superior Court." (*Id.* at 16, fn. 13.)

II.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

A. Standard of Review pursuant to FED.R.CIV.P. 12(b)(6)

A Rule 12(b)(6) dismissal may be based on either a "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff's

complaint must provide a "short and plain statement of the claim showing that [he] is entitled to relief." *Id.* (citing FED.R.CIV.P. 8(a)(2)). "Specific facts are not necessary; the statement need only give the defendant[s] fair notice of what ... the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation marks omitted).

Still, every complaint must, at a minimum, plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). Facts which are alleged in the complaint are presumed true, and the court must construe them and draw all reasonable inferences from them in favor of the plaintiff. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

In addition, factual allegations asserted by pro se petitioners, "however inartfully pleaded," are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona in a civil

rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

Nevertheless, and in spite of the deference the court is bound to pay to any factual allegations made, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit" or those which are "merely conclusory," require "unwarranted deductions" or "unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted), *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable inferences or conclusions of law cast in the form of factual allegations).

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B. Eighth Amendment allegations - Count "1"

1. Claims against Defendant Ritter

Defendant Ritter moves to dismiss the Eighth Amendment claims against him found in Count "1" of Plaintiff's First Amended Complaint for failing to state a claim upon which relief can be granted pursuant to FED.R.CIV.P. 12(b)(6).

"After incarceration, only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eight Amendment." *Whitely v. Albers*, 475 U.S. 312, 319 (1986). To assert an Eighth Amendment claim for deprivation of humane conditions of confinement, a prisoner must allege facts sufficient to fulfill two requirements: one objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the objective requirement, the prisoner must allege facts sufficient to show that the prison official's acts or omissions deprived him of the "minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Farmer*, 511 U.S. at 834. This objective component is satisfied so long as the institution "furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982); *Farmer*, 511 U.S. at 832; *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981).

Under the subjective requirement, the prisoner must allege facts that show that the defendant acted with "deliberate indifference." *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). "Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; *Wilson*, 501 U.S. at 302-303.

In Plaintiff's First Amended Complaint he alleges that Defendant Ritter "photographed Plaintiff's external injuries" after he had been taken to the prison infirmary. (FAC at ¶ 9.) Later Plaintiff alleges that Defendant Ritter "submitted fabricated disciplinary reports against Plaintiff with a specific intent to retaliate and harm Plaintiff." (*Id*. at ¶ 68.) Based on these allegations, there is simply no factual basis to support a claim for deliberate indifference by Defendant

Ritter for merely photographing Plaintiff's injuries.

In Plaintiff's Opposition dated January 23, 2009, Plaintiff argues that "subsequent to Defendant Ritter's arrival at the prison infirmary and observation of Plaintiff's gross physical condition, Defendant Ritter's official obligation and responsibility was to take reasonable measures to guarantee Plaintiff's safety." (*See* Pl.'s Opp'n at 4.) However, the facts alleged by Plaintiff do not demonstrate that Defendant Ritter played any role in inhibiting or delaying his medical treatment. Nor does Plaintiff provide any facts that would demonstrate that the actions of Defendant Ritter caused him any further harm. The only allegation that Plaintiff refers to is the alleged fabricated disciplinary report that Defendant Ritter allegedly prepared eight months after the incident. (*See* FAC at ¶ 72.) However, Plaintiff later admits that he has not been subjected to a disciplinary hearing as a result of these alleged fabricated disciplinary reports. (*Id.* at ¶ 100.)

Thus, Defendant Ritter's Motion to Dismiss the Eighth Amendment claims against him pursuant to FED.R.CIV.P. 12(b)(6) is **GRANTED** without leave to amend.

2. Claims against Defendants Harmon and Duarte

Defendants Harmon and Duarte also seek dismissal of all claims against them found in Count "1" of Plaintiff's First Amended Complaint. In Plaintiff's First Amended Complaint, the allegations against these Defendants are that they made "obscene/vulgar statements directed at Plaintiff that caused Plaintiff further physical and emotional distress" while he was waiting for the prison's physician to examine him. (*See* FAC at ¶ 54.) These Defendants were not alleged to be present prior to or during the incident which caused Plaintiff's injuries.

Verbal harassment or verbal abuse by prison officials generally does not constitute a violation of the Eighth Amendment. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (harassment does not constitute an Eighth Amendment violation); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (harassment in the form of vulgar language directed at an inmate is not cognizable under § 1983); *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (verbal threats and name calling are not actionable under § 1983). While Plaintiff alleges in his First Amended Complaint that the alleged harassment caused him additional physical injuries, he does

not specify what those injuries were. Plaintiff appears to clarify this claim in his Opposition to Defendants' Motion dated April 9, 2009 in which he states that the verbal harassment caused him "psychological harm." (*See* Pl.'s Opp'n at 2.)

The Prison Litigation Reform Act ("PLRA") states, in part, that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). This provision requires "a prior showing of physical injury that need not be significant but must be more than de minimus." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002). Here, as set forth in Plaintiff's First Amended Complaint and Opposition, the only injury that he claims with respect to the actions of Defendants Duarte and Harmon is a psychological injury.

Thus, for all these reasons, the Court **GRANTS** Defendants Harmon and Duarte's Motion to Dismiss the Eighth Amendment claims against them pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

D. Fourteenth Amendment Claims

1. Due Process Claims

Defendants Andalon, Mejia, Sandoval, Castaneda, Cosio, Bell, Ochoa, Price and Stratton move to dismiss Plaintiff's Count "2" claims in which he alleges that his Fourteenth Amendment due process rights were violated by the alleged false reports written by several of the named Defendants. For the reasons set forth below, Plaintiff's Fourteenth Amendment claims against all Defendants should be dismissed as they are not yet cognizable.

The Due Process Clause prohibits states from "depriving any person of life, liberty, or property, without the due process of law." U.S. CONST. AMEND. XIV. The procedural guarantees of due process apply only when a constitutionally-protected liberty or property interest is at stake. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). In order to invoke the protection of the Due Process Clause, Plaintiff must first establish the existence of a liberty interest. *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384 (2005); *Sandin v. Conner*, 515 U.S. 472 (1995). In *Sandin*, the Supreme Court "refocused the test for determining the existence of

a liberty interest away from the wording of prison regulations and toward an examination of the hardship caused by the prison's challenged action relative to the 'basic conditions' of life as a prisoner." *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (citing *Sandin*, 515 U.S. at 484); *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002) (noting that *Sandin* abandons the mandatory/permissive language analysis courts traditionally looked to when determining whether a state prison regulation created a liberty interest which required due process protection).

Thus, "[a]fter *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 125 S.Ct. at 2394. The *Sandin* test requires a case-by-case examination of both the conditions of the prisoner's confinement and the duration of the deprivation at issue. *Sandin*, 515 U.S. at 486.

The Court must determine whether Plaintiff has established a protected liberty interest. Accordingly, under *Sandin*, the Court must determine whether the alleged fabrication of disciplinary reports "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In *Sandin*, the Court found there were three factors to consider when determining whether disciplinary segregation imposes atypical and significant hardship: "(1) disciplinary segregation was essentially the same as discretionary forms of segregation; (2) a comparison between the plaintiff's confinement and conditions in the general population showed that the plaintiff suffered no "major disruption in his environment"; and the length of the plaintiff's sentence was not affected." *Jackson v. Carey*, 353 F.3d 750, 755 (quoting *Sandin*, 515 U.S. at 486-87).

Here, Plaintiff admits that he has never been subject to a disciplinary hearing resulting from these alleged falsified reports. (*See* FAC at ¶ 100.) He does not allege that he was ever sentenced to administrative segregation. Instead, it appears that a criminal action was instigated in the Imperial County Superior Court against Plaintiff for the events that occurred on June 10, 2005. Plaintiff makes allegations of perjury and false reports before the Grand Jury in the

Imperial County Superior Court. (*See* FAC at ¶ 103.) Plaintiff cannot bring these claims in this action while his criminal proceeding is ongoing.

These claims are barred by the favorable termination doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Plaintiff's claims amount to an attack on the constitutional validity of his ongoing state criminal proceeding, and as such, may not be maintained pursuant to 42 U.S.C. § 1983 unless and until he can show that conviction has already been invalidated. *Heck*, 512 U.S. at 486-87; *Ramirez*, 334 F.3d at 855-56.

"In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to remedy the alleged wrong." *Haygood v. Younger*, 769 F.2d 1350, 1353 (9th Cir. 1985) (en banc). A prisoner in state custody simply may not use a § 1983 civil rights action to challenge the "fact or duration of his confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The prisoner must seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (*quoting Preiser*, 411 U.S. at 489). Thus, Plaintiff's § 1983 action "is barred (absent prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target of his suit (state conduct leading to conviction or internal prison proceedings)--if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 82.

In this case, Plaintiff's claims "necessarily imply the invalidity" of his ongoing criminal proceedings. *Heck*, 512 U.S. at 487. In creating the favorable termination rule in *Heck*, the Supreme Court relied on "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding *criminal judgments*." *Heck*, 511 U.S. at 486 (emphasis added); *see also Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005). This is precisely what Plaintiff attempts to accomplish here. Therefore, to satisfy *Heck's* "favorable termination" rule, Plaintiff must first allege facts which show that the conviction and sentence has already been: (1) reversed on direct appeal; (2) expunged by executive order; (3) declared invalid by a state tribunal authorized to make such a determination; or (4) called into question by the grant of a writ of habeas corpus. *Heck*, 512 U.S. at 487 (emphasis added); *see also Butterfield v. Bail*, 120 F.3d 1023, 1025 (9th Cir. 1997).

For all these reasons, Defendants Motions to Dismiss Plaintiff's Fourteenth Amendment Due Process claims found in Count "2" are **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

2. Equal Protection Claims

Defendants seek dismissal of Plaintiff's Fourteenth Amendment Equal Protection claims found in Count "2" of Plaintiff's First Amended Complaint. The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993).

However, conclusory allegations of discrimination are insufficient to withstand a motion to dismiss, unless they are supported by facts that may prove invidious discriminatory intent or purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Therefore, when an equal protection violation is alleged, the plaintiff must plead facts to show that the defendant "acted in a discriminatory manner and that the discrimination was intentional." *FDIC v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991) (citations omitted). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Here, Plaintiff's First Amended Complaint is devoid of any facts to show that he was discriminated against in any manner or that he was treated differently from any other class of prisoners. Plaintiff's Oppositions shed no light on this issue either, other than to say that Defendants had an "illegitimate desire to 'get' him." (*See* Apr. 9, 2009 Opp'n at 5.) Thus, Plaintiff has plead no facts from which the Court could find he has stated a Fourteenth Amendment equal protection claim. Accordingly, Defendants' Motions to Dismiss Plaintiff's Fourteenth Amendment Equal Protection claim pursuant to FED.R.CIV.P. 12(b)(6) is **GRANTED** without leave to amend.

E. Fourth Amendment Claims - Count "3"

Defendants move to dismiss Plaintiff's Fourth Amendment unreasonable search and seizure claims. There are two separate constitutional violations claimed by Plaintiff with respect to his Fourth Amendment claims. One claim for an alleged constitutional violation appears to be that Plaintiff claims his Fourth Amendment rights were violated by the mere entry of Defendants Torres and Schommer into his cell. The second incident is a cell search conducted by Price on June 13, 2005. (*See* FAC at ¶¶ 17-23, 93-95.) Although prisoners enjoy some protections under the Constitution, imprisonment carries with it the loss of many significant rights. *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) ("Loss of freedom of choice and privacy are inherent incidents of confinement."). The curtailment of certain rights is necessary to accommodate a myriad of prison objectives, chief among which is internal security. *Id.*; *Taylor v. Knapp*, 871 F.2d 803, 806 (9th Cir. 1989). A prisoner's expectation of privacy must always yield to the paramount interest in prison security. *Hudson*, 468 U.S. at 528. Thus, a prisoner does not have a legitimate expectation of privacy, and the Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell. *See id.* at 526, 536; *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996). Thus, Plaintiff cannot state a Fourth Amendment claim against any Defendant for entering or searching his cell.

To the extent that Plaintiff is seeking to allege a Fourth Amendment claim against Torres and Schommer for the actions they allegedly took against him while he was in his cell, he has already brought these claims under the Eighth Amendment. "Where an amendment 'provides an explicit textual source of constitutional protection against a particular sort of government behavior,' it is that Amendment, that 'must be the guide for analyzing the complaint.'" *Picray v. Sealock*, 138 F.3d 767, 770 (9th Cir. 1998) (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)).

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In addition, to the extent that Plaintiff is seeking to bring a Fourth Amendment claim related to the alleged unauthorized taking of his property by Defendant Price, the Court had granted Defendants' previous Motion to Dismiss and denied Plaintiff leave to amend this claim. (*See* Sept. 25, 2008 Order at 15.)

Accordingly, for all the reasons set forth above, Defendants' Motions to Dismiss Plaintiff's Fourth Amendment claims are **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

F. First Amendment Claims - Count "4"

Defendants Harmon, Duarte, Stratton, Mejia and Sandoval move to dismiss Plaintiff's First Amendment claims against them on the grounds that there are no facts alleged to support a claim against them. Plaintiff claims his First Amendment rights have been violated because he has been denied the "right to petition the government for a redress of grievances" and "acts of retaliation and acts of intimidation." (FAC at 17.)

1. Right to Petition the Government/Access to Courts Claim

Inmates "have a constitutional right to petition the government for redress of their grievances, which includes a reasonable right of access to the courts." *O'Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In order to establish a violation of the right of access to the courts, however, an inmate must allege facts sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An "actual injury" is defined as "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." *Id.* at 348.

Plaintiff has not stated a claim for denial of access to the courts because he has not alleged any facts sufficient to show that he has been precluded from pursuing a non-frivolous direct or collateral attack upon either his criminal conviction or sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right to access to the courts protects only an inmate's need and ability to "attack [his] sentence[], directly or collaterally, and . . . to challenge

the conditions of [his] confinement."); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous nature of the "underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint.")

There are no allegations whatsoever that interference with his administrative grievances, alleged interference with his legal mail or the loss of his legal documents caused any injury at all, much less the type of "actual injury" required to state a claim under *Lewis*. Thus, Defendants' Motion to Dismiss Plaintiff's Access to Court's claim is **GRANTED** without leave to amend.

2. Retaliation claim

Defendants Harmon, Duarte, Stratton,[2] Mejia and Sandoval also seek dismissal of Plaintiff's retaliation claim. A plaintiff suing prison officials pursuant to § 1983 for retaliation must allege sufficient facts to show: (1) he was retaliated against for exercising his constitutional rights, (2) the alleged retaliatory action "does not advance legitimate penological goals, such as preserving institutional order and discipline," *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam), and (3) the defendants' actions harmed him. *See Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997); *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

Courts must "'afford appropriate deference and flexibility' to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)). Thus, the burden is on the prisoner to allege facts which demonstrate "that there were no legitimate correctional purposes motivating the actions he complains of." *Id.* at 808.

Plaintiff's First Amended Complaint is devoid of any facts from which the Court could find that Defendants Harmon, Duarte, Stratton, Mejia or Sandoval retaliated against him. Plaintiff has not alleged any facts to show that the actions of the Defendants were in response to Plaintiff exercising his constitutional rights. Plaintiff's Oppositions refer to the Defendants

[2] Defendant Stratton is not named as a Defendant in Plaintiff's First Amendment claim, Count "4." (*See* FAC at 17.)

"ominous appearance" but their mere presence is not enough to state a retaliation claim. (*See* Pl.'s Jan. 23, 2009 Opp'n at 16.) Plaintiff's only reference to Defendant Mejia is that he arrived at Plaintiff's hospital bed and "as a mere formality videotaped Plaintiff." (FAC at ¶ 57.) It is unclear how the videotaping of Plaintiff's injuries would be used to retaliate against Plaintiff. In addition, Plaintiff has not alleged any facts to show that the Defendants actions lacked or failed to advance "legitimate penological goals such as preserving institutional order and discipline." *Barnett*, 31 F.3d at 815-16; *Pratt*, 65 F.3d at 808; *Bruce*, 351 F.3d at 1289. For all these reasons, Defendants' Harmon, Duarte, Stratton, Mejia and Sandoval's Motions to Dismiss Plaintiff's retaliation claims are **GRANTED** for failure to state a claim upon which relief can be granted pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

G. Conspiracy Claims pursuant to 42 U.S.C. §§ 1985(3) and 1986 - Count "5"

Defendants seek dismissal of Plaintiff's conspiracy claims that he has brought pursuant to 42 U.S.C. §§ 1985(3) and 1986. "To state a cause of action under § 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States." *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). "[T]he language requiring intent to deprive *equal* protection . . . means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102; *see also Sever*, 978 F.2d at 1536.

Here, Plaintiff fails to allege membership in a protected class and fails to allege that any Defendant acted with class-based animus, both of which are essential elements of a cause of action under 42 U.S.C. § 1985(3). *See Griffin*, 403 U.S. at 101-02; *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (holding that conspiracy plaintiff must show membership in a judicially-designated suspect or quasi-suspect class); *Portman v. County of Santa Clara*, 995 F.2d 898, 909 (9th Cir. 1993). Accordingly, the Court **GRANTS** Defendants' Motions to

Dismiss Plaintiff's conspiracy claims brought pursuant to 42 U.S.C. § 1985(3) for failing to state a claim pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

Moreover, to the extent that Plaintiff seeks to bring a § 1986 conspiracy claim, he cannot do so. "Section 1986 authorizes a remedy against state actors who have negligently failed to prevent a conspiracy that would be actionable under § 1985." *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 971 n.7 (9th Cir. 1994). "A claim can be stated under [§] 1986 only if the complaint contains a valid claim under [§] 1985." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988). Because Plaintiff is unable to state a conspiracy claim pursuant to 42 U.S.C. § 1985(3), he cannot state a claim pursuant to 42 U.S.C. § 1986. Thus, Defendants' Motions to Dismiss Plaintiff's conspiracy claims brought pursuant to 42 U.S.C. § 1986 are **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

H. Defendant Pegues' Notice of Joinder in Motions to Dismiss

Defendant Pegues seeks dismissal of all claims against him and joins Defendants' Motions to Dismiss Plaintiff's First Amended Complaint. In Plaintiff's First Amended Complaint, he alleges, following the incident on June 10, 2005, Defendant Pegues was informed by a prison physician that Plaintiff needed to be "immediately transferred" to a hospital for further treatment. (*See* FAC ¶ 60.) Plaintiff further alleges that Defendant Pegues "refused to act or expedite Plaintiff's transfer to [the hospital]" which allowed Plaintiff's "suffering condition to deteriorate." (*Id.* ¶ 61.)

Defendant Pegues' Joinder fails to address these claims that are sufficient to state an Eighth Amendment deliberate indifference to serious medical need claim. Accordingly, those claims remain against Defendant Pegues.

Defendant Pegues does argue that he cannot be held liable for failing to file a report on Plaintiff's injuries. (*See* Joinder at 3.) The Ninth Circuit has held that an inadequate investigation alone does not "involve[] the deprivation of a protected right," but must involve "another recognized constitutional right." *See Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985). Here, while Plaintiff has stated an Eighth Amendment claim for other actions he alleges on the part of Pegues, there is no constitutional violation alleged resulting from this failure to file a

report. Accordingly, Defendant Pegues' Motion to Dismiss Plaintiff's Fourteenth Amendment claims pursuant to FED.R.CIV.P. 12(b)(6) is **GRANTED** without leave to amend.

III.

DISMISSAL OF REMAINING UNSERVED DEFENDANTS PER FED.R.CIV.P. 4(m)

Two Defendants have remained unserved in this action, Defendants Torres and Bailey. The Court has previously ordered the Attorney General's Office to obtain the last known contact information for Torres and Bailey from the California Department of Corrections and Rehabilitation ("CDCR") and provide this information to the U.S. Marshal in a confidential memorandum. (*See* Jan. 26, 2009 Order at 3-4.) However, Plaintiff's attempts to serve either Defendant via the U.S. Marshal was unsuccessful. Thus, Plaintiff filed another Motion requesting "the Court's assistance in initiating other appropriate mechanism[s] for locating and effecting service upon Torres and Bailey." (Pl.'s Mot. for Order to Locate at 4, Doc. No. 98.) The Court found that Deputy Attorney General Snyder fully complied with the Court's Order but the U.S. Marshal was unable to serve either Defendant with the last known address provided by the CDCR. (*See* April 30, 2009 Order at 1-2.) The Court denied Plaintiff's Motion and informed Plaintiff that while "an incarcerated pro se litigant proceeding *in forma pauperis* is entitled to rely on the service of the summons and complaint by the U.S. Marshal, the U.S. Marshal can attempt service only after it has been provided with the necessary information to effectuate service." (*Id.* at 2; citing *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990).

Plaintiff was granted one last extension of time to effect service on Defendants Torres and Bailey. Plaintiff was to effect service on these Defendants by June 12, 2009. (*See* Apr. 30, 2009 Order at 3.) That time has passed and Plaintiff has failed to serve these Defendants. Accordingly, Federal Rule of Civil Procedure 4(m) requires their dismissal. *See* FED.R.CIV.P. 4(m) (defendants must be served within 120 days after the filing of the complaint.); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (noting that one "becomes a party officially, and is required to take action in that capacity, only upon service of summons or other authority-asserting measure stating the time within which the party served must appear to defend."). "In the absence of service of process (or waiver of service by the defendant),"

under FED.R.CIV.P. 4, "a court ordinarily may not exercise power over a party the complaint names as a defendant." *Id.*

For these reasons, the Court hereby DISMISSES Defendants Torres and Bailey from this action pursuant to FED.R.CIV.P. 4(m).

IV.

CONCLUSION AND ORDER

Based on the foregoing, the Court hereby:

(1) **GRANTS** Defendant Ritter's Motion to Dismiss the Eighth Amendment claims against him pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(2) **GRANTS** Defendants Harmon and Duarte's Motion to Dismiss the Eighth Amendment claims against them pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(3) **GRANTS** Defendants' Motions to Dismiss Plaintiff's Fourteenth Amendment Due Process and Equal Protection claims and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(4) **GRANTS** Defendants' Motions to Dismiss Plaintiff's Fourth Amendment claims and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(5) **GRANTS** Defendants' Motions to Dismiss Plaintiff's Access to Courts claims and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(6) **GRANTS** Defendants Megia, Sandoval, Harmon, Stratton and Duarte's Motion to Dismiss Plaintiff's First Amendment retaliation claims pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(7) **GRANTS** Defendants' Motion to Dismiss Plaintiff's conspiracy claims and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;

(8) **DENIES** Defendant Pegues' Motion to Dismiss Plaintiff's Eighth Amendment

claims pursuant to FED.R.CIV.P. 12(b)(6);

(9) **DISMISSES** Defendants Torres and Bailey without prejudice pursuant to FED.R.CIV.P. 4(m); and

(10) **ORDERS** Defendants Ryan, Ochoa, Pegues, Jimenez, Zills, Schommer, Ortiz, Rodiles, Mejia, Sandoval, Wells, Castaneda, Cosio, Bell, Andalon, Stratton, Flores, Ritter, Price, Martinez, Valenzuela and Rangel to file their Answer to the claims remaining in Plaintiff's First Amended Complaint within ten (10) days of the date this Order is "Filed" pursuant to FED.R.CIV.P. 12(a)(4)(A).

IT IS SO ORDERED.

DATED: June 26, 2009

HON. NAPOLEON A. JONES, JR.
United States District Judge