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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOHN PAUL THOMAS,	)	Civil No. 07-1141-WVG
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANTS'
	)	MOTION TO DISMISS
v.	)	
	)	(Doc. # 23)
ROBERT HERNANDEZ, BOARD OF	)	
PRISON TERMS UNKNOWN DEPUTY	)	
COMMISSIONER,	)	
	)	
Defendants.	)	
	)	
_____	)	

John Paul Thomas(hereafter "Plaintiff"), an inmate proceeding *pro se* and *in forma pauperis*, filed a Complaint pursuant to 42 U.S.C. § 1983 (hereafter "Complaint") claiming that his civil rights were violated in March 2007, when he was housed at the Richard J. Donovan Correctional Facility. He sues Defendants Robert Hernandez and Board of Prison Terms Unknown Deputy (hereafter "Defendant Hernandez," "Defendant Unknown Deputy," or collectively "Defendants"), in their official and individual capacities, and seeks injunctive relief, compensatory damages, and punitive damages. Defendants have filed a Motion to Dismiss the Complaint. Plaintiff has filed an Opposition to

1 the Motion. In Plaintiff's Complaint, Plaintiff consented to have the  
2 undersigned conduct all proceedings in this case, including trial and  
3 the entry of final judgment, pursuant to 28 U.S.C. §636(c) and Fed.  
4 R. Civ. Pro. 73. On April 16, 2010, Defendants also so stipulated.  
5 The Court, having reviewed the Complaint, Opposition, the exhibits  
6 attached thereto, and GOOD CAUSE APPEARING, HEREBY GRANTS Defendants'  
7 Motion to Dismiss.

8 I

9 FACTUAL ALLEGATIONS

10 On December 16, 2006, Plaintiff was served with a notice of  
11 an institutional disciplinary hearing, CDC Serious Rule Violation  
12 Report form 115 (hereafter "RVR"). The RVR alleged that Plaintiff  
13 committed a battery on a peace officer. (Complaint at 3).

14 On January 10, 2007, Plaintiff was informed that the Board of  
15 Prison Terms (hereafter "BPT"), gave him an "in house parole  
16 violation," or a "parole revocation extension," because of the RVR.  
17 (Complaint at 3). On that same day, Plaintiff signed a BPT form  
18 entitled, "Notice of Rights/Acknowledgment of Parole Revocation  
19 Extension Proceedings," which started a thirty-five calendar day time  
20 limit to hold his final parole revocation hearing. (Complaint at 3).

21 On February 14, 2007, the time limit expired. After the time  
22 limit expired, Plaintiff wrote a letter to Defendant Hernandez that  
23 explained to Hernandez that Hernandez must dismiss the charges and  
24 drop the "parole hold" against him. Thereafter, Plaintiff received  
25 from Hernandez a letter of denial. (Complaint at 3).

26 On March 15, 2007, Plaintiff had his parole revocation  
27 extension hearing. At the hearing, Plaintiff's representative  
28 explained that Plaintiff's parole revocation extension hearing had to

1 be dropped because the BPT allowed the thirty-five day deadline to  
2 lapse. Defendant Unknown Deputy responded that it would not matter  
3 because Plaintiff would still be in prison. (Complaint at 3).  
4 Plaintiff explained that the allegations of battery in the RVR were  
5 false and provided two witness statements to corroborate his version  
6 of the events. He claims that he did not assault a peace officer.  
7 Rather, the peace officer assaulted him. (Complaint at 4, 5).  
8 Plaintiff requested that the written statements be returned to him.  
9 The BPT told Plaintiff that it would return the statements to him by  
10 mail. Plaintiff claims that the statements were not returned to him.  
11 (Complaint at 5).

12           At the hearing, Plaintiff was found guilty of the Rule  
13 Violation and was given an additional 110 day sentence. (Complaint at  
14 3, 4). Plaintiff claims that he requested final written documentation  
15 of the hearing, but Defendant Hernandez has not provided it to him.  
16 (Complaint at 4).

17           On May 10, 2007, Plaintiff filed a Petition for Writ of Habeas  
18 Corpus in the Superior Court. The Petition claimed that the result  
19 of the parole revocation hearing violated his constitutional rights.  
20 The Petition was denied because, as Plaintiff alleges, he failed to  
21 provide the court with the necessary documentation of the parole  
22 revocation hearing. Plaintiff alleges that the documentation to which  
23 the court referred was the final written documentation of the parole  
24 revocation hearing that was never given to him despite his request to  
25 receive it. (Complaint at 4).

26           Further, Plaintiff alleges that he needs the two above-noted  
27 written statements about how he was assaulted by a prison correct-

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1 ional officer in order to pursue a separate lawsuit regarding the  
2 assault. (Complaint at 5).

3 II

4 PLAINTIFF'S CLAIMS

5 Plaintiff claims the following:

6 (1) His right to due process was violated because his parole  
7 revocation hearing was held after the expiration of the 35-day period  
8 to hold the hearing; and

9 (2) His right to due process was violated because Defendants denied  
10 him access to the courts.

11 Defendants' Motion asserts:

12 (1) The Court does not have subject matter jurisdiction over  
13 Plaintiff's claim regarding his parole revocation hearing; and

14 (2) Plaintiff's access to the courts claim should be dismissed because  
15 Plaintiff attempted to advance a frivolous claim; Plaintiff was not  
16 precluded from filing a lawsuit for assault against a correctional  
17 officer; and Plaintiff, in fact, filed the lawsuit for assault against  
18 the correctional officer.

19 III

20 STANDARD OF REVIEW

21 A motion to dismiss for failure to state a claim pursuant to  
22 FED. R. CIV. P. 12(b)(6) tests the legal sufficiency of the claims in  
23 the complaint. FED. R. CIV. P. 8(a)(2) requires only "a short and  
24 plain statement of the claim showing that the pleader is entitled to  
25 relief" in order to "give the defendant fair notice of what the ...  
26 claim is and the grounds upon which it rests." Bell Atlantic Corp.  
27 v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355  
28 U.S. 41, 47 (1957)); Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007).

1 Dismissal of a claim is appropriate only where the complaint lacks a  
2 cognizable theory. Bell Atlantic, 550 U.S. at 553-565. The court  
3 must accept as true all material allegations in the complaint, as well  
4 as reasonable inferences to be drawn from them, and must construe the  
5 complaint in the light most favorable to the plaintiff. N.L.  
6 Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Parks  
7 School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.  
8 1995). The court does not look at whether the plaintiff will  
9 "ultimately prevail." Scheuer v. Rhodes, 94 S.Ct. 1683, 1686 (1974).

10 "If a complaint is accompanied by attached documents, the  
11 court is not limited by the allegations contained in the complaint.  
12 These documents are part of the complaint and may be considered in  
13 determining whether the plaintiff can prove any set of facts in  
14 support of the claim." Roth v. Garcia Marquez, 942 F.2d 617, 625 n.1  
15 (1991) [quoting Durning v. First Boston Corp., 815 F.2d 1265, 1267  
16 (9th Cir.1987)]. "[W]hen the allegations of the complaint are refuted  
17 by an attached document, the Court need not accept the allegations as  
18 being true." Roth, 942 F.2d 625 n.1 [citing Ott v. Home Savings &  
19 Loan Ass'n, 265 F.2d 643, 646 n.1 (9th Cir.1958)].

20 "The focus of any Rule 12(b)(6) dismissal . . . is the  
21 complaint." Schneider v. California Dep't of Corrections, 151 F.3d  
22 1194, 1197 n.1 (9th Cir. 1998). Thus, when resolving a motion to  
23 dismiss for failure to state a claim, the court may not generally  
24 consider materials outside the pleadings. Id. This precludes  
25 consideration of "new" allegations that may be raised in a plaintiff's  
26 opposition to a motion to dismiss brought pursuant to FED.R.CIV.P.  
27 12(b)(6). Id. (citing Harrell v. United States, 13 F.3d 232, 236 (7th  
28 Cir. 1993); 2 Moore's Federal Practice, § 12.34[2] (Matthew Bender 3d

1 ed.) ["The court may not . . . take into account additional facts  
2 asserted in a memorandum opposing the motion to dismiss, because such  
3 memoranda do not constitute pleadings under Rule 7(a)."]].

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
5 show: (1) that the conduct complained of was committed by a person  
6 acting under color of state law; and, (2) that the conduct deprived the  
7 plaintiff of a constitutional right. Broam v. Bogan, 320 F.3d 1023,  
8 1028 (9<sup>th</sup> Cir. 2003); Balistreri v. Pacifica Police Dept., 901 F.2d  
9 696, 699 (9<sup>th</sup> Cir. 1988). Vicarious liability does not exist under §  
10 1983. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948 (2009); Jones v.  
11 Williams, 297 F.3d 930, 934 (9th Cir. 2002) (citations omitted). To  
12 hold a person "liable under section 1983 there must be a showing of  
13 personal participation in the alleged rights deprivation." Id. A  
14 supervisory official may be liable only if he or she was personally  
15 involved in the constitutional deprivation, or if there was a  
16 sufficient causal connection between the supervisor's wrongful conduct  
17 and the constitutional violation. See Redman v. County of San Diego,  
18 942 F.2d 1435, 1446 (9th Cir. 1991). Causation may be established only  
19 by showing that the supervisor set in motion a series of acts by  
20 others, which the supervisor knew or reasonably should have known  
21 would cause others to inflict the injury. Watkins v. City of Oakland,  
22 145 F.3d 1087, 1093 (9th Cir. 1998).

23 Where a plaintiff appears *in propria persona* in a civil rights  
24 case, the Court must also be careful to construe the pleadings  
25 liberally and afford plaintiff any benefit of the doubt. See Karim-  
26 Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988);  
27 Bretz v. Kelman, 773 F.2d 1026, 1027, n.1 (9th Cir. 1985) (en banc).  
28 The rule of liberal construction is "particularly important in civil

1 rights cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.  
2 1992); Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) ("Presum-  
3 ably unskilled in the law, the pro se litigant is far more prone to  
4 making errors in pleading than the person who benefits from the  
5 representation of counsel."). In giving liberal interpretation to a  
6 pro se civil rights complaint, however, a court may not "supply  
7 essential elements of the claim that were not initially pled." Ivey  
8 v. Bd. of Regents of the University of Alaska, 673 F.2d 266, 268 (9th  
9 Cir. 1982). "Vague and conclusory allegations of official participa-  
10 tion in civil rights violations are not sufficient to withstand a  
11 motion to dismiss." Id.; see also Sherman v. Yakahi, 549 F.2d 1287,  
12 1290 (9th Cir. 1977) ("Conclusory allegations, unsupported by facts,  
13 [will be] rejected as insufficient to state a claim under the Civil  
14 Rights Act."). Thus, at a minimum, even the pro se plaintiff "must  
15 allege with at least some degree of particularity overt acts which  
16 defendants engaged in that support [his] claim." Jones v. Community  
17 Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).

18 "Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can  
19 attack the substance of a complaint's jurisdictional allegations  
20 despite their formal sufficiency, and in doing so rely on affidavits  
21 or any other evidence properly before the court." United Here Int'l.  
22 Union v. Pala Band of Mission Indians, 583 F. Supp. 2d 1190, 1194  
23 (S.D. Cal. 2008)[citing St. Clair v. City of Chico, 880 F.2d 199, 201  
24 (9<sup>th</sup> Cir. 1989)]. In ruling on a challenge to subject matter jurisdic-  
25 tion, the district court is ordinarily free to consider evidence  
26 regarding jurisdiction, and may resolve factual disputes when  
27 necessary. United Here, 583 F. Supp. 2d at 1194 [citing Thornhill  
28 Publishing v. General Tel. & Electric Corp, 594 F.2d 730, 733 (9<sup>th</sup>

1 Cir. 1979)]. In such circumstances, presumptive truthfulness does not  
2 attach to a plaintiff's allegations and the existence of disputed  
3 material facts does not preclude the court from evaluating the merits  
4 of the jurisdictional claim. United Here, 583 F. Supp. 2d at 1194-1195  
5 (citing Thornhill, 594 at 733).

6 IV

7 THE COURT DOES NOT HAVE JURISDICTION OVER PLAINTIFF'S  
8 PAROLE REVOCATION CLAIM

9 Plaintiff claims that his due process rights were violated  
10 because his parole revocation hearing was not held within 35 days of  
11 receiving and signing the parole revocation notice. Defendants argue  
12 that the Court lacks jurisdiction over Plaintiff's claim.

13 On January 10, 2007, Plaintiff received and signed the parole  
14 revocation notice. On March 15, 2007, the BPT held Plaintiff's parole  
15 revocation hearing. At the hearing, Plaintiff was found guilty of a  
16 Rules Violation and was given an additional 110 day sentence.

17 Although it is not clear from Plaintiff's Complaint, Plaintiff  
18 appears to allege that he is a member of a class of inmates governed  
19 by the remedial Order of Permanent Injunction filed in Valdivia v.  
20 Schwarzenegger, No. S-94-0671 LKK/GGH (E.D. Cal. March 9,  
21 2004)(hereafter "Valdivia Order"). In Valdivia, the court certified  
22 a class which consists of the following persons: (1) California  
23 parolees who are at large; (2) California parolees in custody as  
24 alleged parole violators, and who are awaiting revocation of their  
25 state parole; and (3) California parolees who are in custody having  
26 been found in violation of parole and sentenced to prison custody.  
(Valdivia Order at 1).

27 Further, the Valdivia Order states: "For all parolees who do  
28 not waive or seek a continuance of a final revocation hearing,



1 Defendants shall provide a final revocation hearing on or before the  
2 35<sup>th</sup> calendar day after the placement of the parole hold." [Valdivia  
3 Order at 4, 6, Sections IV.11(b)(iv) and 23](attached to Defendant's  
4 Memorandum of Points and Authorities in Support of Motion to Dismiss,  
5 Exh. A).<sup>1/</sup>

6 Here, Plaintiff appears to be a member of the class in that  
7 he is in custody and has been found in violation of parole and  
8 sentenced to prison custody. Therefore, the requirements of the  
9 Valdivia Order appear to apply to him. For purposes of this Order,  
10 the Court will so assume.

11 The Court lacks subject matter jurisdiction over Plaintiff's  
12 parole revocation claim because the Valdivia court expressly retained  
13 jurisdiction over such claims. (Valdivia Order at 7, Section VII.  
14 28.). Brown v. Cate, 2009 WL 1858119 at \*5 (E.D. Cal. June 29, 2009);  
15 Soto v. Board of Prison Terms, 2007 WL 2947573 at \*2 (E.D. Cal.  
16 October 9, 2007). Therefore, Plaintiff must seek the relief requested  
17 in his parole revocation claim in the Court that issued the Valdivia  
18 Order.

19 Further, a remedial order, standing alone can not form the  
20 basis of liability under 42 U.S.C. §1983. Green v. McKaskle, 788 F.2d  
21 1116, 1123 (5<sup>th</sup> Cir. 1986). Moreover, in order to state a claim that  
22 failure to hold a timely parole revocation hearing violated a  
23 plaintiff's constitutional rights, a plaintiff must show that the  
24 delay in holding the parole revocation hearing was both unreasonable  
25 and prejudiced his rights. Hopper v. U.S. Parole Commission, 702 F.2d  
26 842, 845 (9<sup>th</sup> Cir. 1983).

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27  
28 <sup>1/</sup> The Court takes judicial notice of the Valdivia Order pursuant to  
Fed. Rule of Evid. 201, and United Here, 583 F. Supp. 2d at 1194-  
1195.

1           In Poynor v. U.S. Parole Commission, 878 F. 2d 275, 277 (9<sup>th</sup>  
2 Cir. 1989), a plaintiff inmate parolee alleged in a petition for writ  
3 of habeas corpus that he was entitled to relief because he suffered  
4 an eight month delay in having his parole revocation hearing. The  
5 court reiterated that an inmate-parolee who makes a claim that his  
6 parole revocation hearing was untimely must show prejudice before  
7 relief can be granted.

8           Here, Plaintiff's Complaint refers to the reporting correc-  
9 tional officer's statements at the March 15, 2007 parole revocation  
10 hearing, that the correctional officer "could not remember due to the  
11 time lapse." (Complaint at 4). Plaintiff argues that had the parole  
12 revocation hearing been timely held, the correctional officer would  
13 have remembered and the correctional officer's testimony would have  
14 been crucial to his defense at the parole revocation hearing.

15           As previously noted, on January 10, 2007, Plaintiff signed the  
16 BPT's Notice of Rights/Acknowledgment of Parole Revocation Proceed-  
17 ings. On March 15, 2007, the parole revocation hearing was held. 64  
18 days elapsed between January 10, 2007 and March 15, 2007. Therefore,  
19 Plaintiff's parole revocation hearing was delayed for 29 days after  
20 the day Plaintiff claims it should have been held, (64 - 35 = 29),  
21 presumably pursuant to the Valdivia Order.

22           Plaintiff's allegation about what the correctional officer  
23 could not remember is unclear. Nevertheless, he assumes that had the  
24 correctional officer been able to remember, his testimony at the  
25 parole revocation hearing would have supported Plaintiff's version of  
26 the events and the BPT would have believed him. Plaintiff's assertions  
27 in these regards are mere speculation. Therefore, the Court can not  
28 conclude that if the correctional officer remembered unspecified facts

1 and circumstances, he would have testified in support of Plaintiff and  
2 that the BPT would have believed him. Further, the Court finds it  
3 unlikely that the correctional officer's memory would have been  
4 different prior to the 29 day delay in holding the parole revocation  
5 hearing. Accordingly, Plaintiff has failed to show that he was  
6 prejudiced in this regard. Further, Plaintiff does not assert any  
7 facts to show that the 29 day delay was unreasonable under the  
8 circumstances.

9 As a result, the Court GRANTS Defendant's Motion to Dismiss  
10 for lack of subject matter jurisdiction and alternatively for  
11 Plaintiff's failure to show that the 29 day delay in holding his  
12 parole revocation hearing was unreasonable, or that he was prejudiced  
13 because of the delay.

14 To the extent that Plaintiff claims that he is not a member  
15 of the class in Valdivia, and he does not bring his claim for the  
16 untimely parole revocation hearing pursuant to Valdivia, he is given  
17 leave of court to file an Amended Complaint.

18 V

19 PLAINTIFF FAILS TO STATE A CLAIM FOR DENIAL OF ACCESS TO THE COURTS

20 Plaintiff claims that he was denied access to the courts  
21 because Defendant Unknown Deputy failed to return to him the "final  
22 written documentation" of his parole revocation hearing. He asserts  
23 that his failure to present the "final written documentation" of the  
24 parole revocation hearing to the California Superior Court caused it  
25 to deny his Petition for Writ of Habeas Corpus. Further, Plaintiff  
26 claims that since the BPT did not return to him the two written  
27 witness statements that he presented at the parole revocation  
28 hearing, his "right to file a lawsuit against the assault has been

1 extremely delayed/hindered to the point of denial of access to the  
2 courts." (Complaint at 4), and that "without these written state-  
3 ments, (he has) been denied the ability to begin writing up my  
4 complaint and form my legal strategy." (Complaint at 5). Defendants  
5 argue that Plaintiff's claim should be dismissed because his Petition  
6 for Writ of Habeas Corpus was frivolous. Defendants also argue that  
7 their actions did not prevent Plaintiff from filing a lawsuit for  
8 assault against a correctional officer, and in fact, Plaintiff filed  
9 the lawsuit for assault against the correctional officer.

10 Under the First and Fourteenth Amendments to the Constitu-  
11 tion, state prisoners have a right of access to the courts. Lewis v.  
12 Casey, 518 U.S. 343, 346 (1996). "(A)ccess to the courts means the  
13 opportunity to prepare, serve and file whatever pleadings or other  
14 documents are necessary or appropriate in order to commence or  
15 prosecute court proceedings affecting one's personal liberty. Id. at  
16 384.

17 When a prisoner asserts that he was denied access to the  
18 courts and seeks a remedy for a lost opportunity to present a legal  
19 claim, he must show: (1) the loss<sup>2/</sup> of a non-frivolous or arguable  
20 underlying claim; (2) the official acts that frustrated the litiga-  
21 tion; and (3) a remedy that may be awarded as recompense but that is  
22 not otherwise available in a future suit. Phillips v. Hust, 477 F.3d  
23 1070, 1076 (9<sup>th</sup> Cir. 2005), citing Christopher v. Harbury, 536 U.S.  
24 403, 413-414 (2002), overruled on other grounds, Hust v. Phillips,  
25 129 S.Ct. 1036 (2009). The right of access to the courts ensures that  
26 a complaint for violation of civil rights or a petition for writ of

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<sup>2/</sup> "Loss" in this context means that a plaintiff was unable to file his claim due to circumstances beyond his control.

1 habeas corpus filed by a person in custody will reach the court for  
2 consideration. Once a claim reaches a court, a person in custody is  
3 in the same position as a person who is not in custody, to file a  
4 civil rights complaint or a petition for writ of habeas corpus.  
5 Cornett v. Donovan 51 F.3d 894, 899 (9<sup>th</sup> Cir. 1995), citing Hooks v.  
6 Wainright, 775 F.2d 1433, 1436 (11<sup>th</sup> Cir. 1985), cert. denied 479 U.S.  
7 913 (1986).

8 1. Denial of Petition for Writ of Habeas Corpus

9 Plaintiff claims that Defendant Unknown Deputy's failure to  
10 provide him "final written documentation" of his parole revocation  
11 hearing caused the California Superior Court to deny his Petition for  
12 Writ of Habeas Corpus.

13 As noted above, in order to state a claim for denial of  
14 access to the courts, Plaintiff must allege the loss of a non-  
15 frivolous or arguable underlying claim. Here, Plaintiff claims that  
16 the Superior Court denied his Petition for Writ of Habeas Corpus due  
17 to his failure to provide the court with the necessary documentation  
18 to support his Petition. However, Plaintiff *filed* the Petition for  
19 Writ of Habeas Corpus in the California Superior Court. Therefore,  
20 the Petition for Writ of Habeas Corpus reached the court for  
21 consideration and the court considered the Petition. As a result,  
22 Plaintiff did not lose his claim, or present facts to suggest that  
23 he was unable to file his claim due top circumstances beyond his  
24 control.

25 Further, as previously noted, in order for Plaintiff to  
26 maintain a claim for denial of access to the courts with regard to  
27 his untimely parole revocation hearing, he must allege that the delay  
28 in holding the parole revocation hearing was unreasonable and

1 prejudiced his rights. Hopper, supra at 845; Poynor, supra at 277.  
2 The Court has already concluded that Plaintiff's Complaint fails to  
3 indicate any facts to suggest that the parole revocation hearing  
4 delay was unreasonable or that the delay prejudiced his rights.  
5 Therefore, the relief sought by Plaintiff in his Petition for Writ  
6 of Habeas Corpus was unavailable. Hopper, supra at 845; Poynor, supra  
7 at 277; Berg v. U.S. Parole Commission, 735 F.2d 378, 379 n.3 (9<sup>th</sup>  
8 Cir. 1984). Moreover, Plaintiff may file another Petition for Writ  
9 of Habeas Corpus in the California Superior Court and/or appellate  
10 court that is supported by the "final written documentation" of the  
11 parole revocation hearing, after he receives that documentation.  
12 Therefore, Plaintiff is afforded a remedy that is available in a  
13 future petition for writ of habeas corpus. As a result, Plaintiff  
14 fails to meet at least two elements required to allege a claim for  
15 denial of access to the courts. Consequently, Defendants' Motion to  
16 Dismiss in this regard is GRANTED. Plaintiff is given leave to  
17 amend his Complaint to cure the deficiencies therein as noted by the  
18 Court.

## 19 2. Right to File a Lawsuit

20 Plaintiff claims that he has been unable to file a lawsuit  
21 for assault against a correctional officer because the BPT did not  
22 return to him two witness statements that he presented at his parole  
23 revocation hearing. Defendants argue that Plaintiff admitted that  
24 he did not file the lawsuit because he feared retaliation from  
25 correctional officers and that he, in fact, filed the lawsuit against  
26 the correctional officer.

27 Plaintiff's Complaint clearly alleges that Plaintiff did not  
28 file a lawsuit against a correctional officer for fear of retaliation

1 from correctional officers. Plaintiff's Complaint states in pertinent  
2 part: "(The correctional officer) was lying to justify his unprovoked  
3 attacking and assaulting me (upcoming lawsuit to be filed after  
4 paroled due to safety issues with peace officers.)" (Complaint at 4).  
5 Here, Plaintiff's allegations establish that he did not file the  
6 lawsuit against a correctional officer who allegedly assaulted him  
7 because he feared retaliation for filing the lawsuit. However,  
8 Plaintiff fails to allege any acts of any correctional officer that  
9 prevented him from filing the lawsuit, or that a remedy is not  
10 available to him in a future lawsuit against the correctional officer  
11 who allegedly assaulted him.

12           Moreover, Plaintiff, in fact, filed the lawsuit he alleges he  
13 could not file. The Court's records reflect that on the same day that  
14 Plaintiff filed the instant lawsuit (June 22, 2007), Plaintiff also  
15 filed another lawsuit against the correctional officer who allegedly  
16 assaulted him. (U.S. District Court, Southern District of California,  
17 Case No. 07-1142, Doc. #1). On June 5, 2008, the Court dismissed that  
18 lawsuit for failure to prosecute. (U.S. District Court, Southern  
19 District of California, Case No. 07-1142, Doc. #8).

20           Therefore, since Plaintiff filed a lawsuit against the  
21 correctional officer who allegedly assaulted him, his claim that he  
22 has been denied access to the courts is belied by the Court's records.  
23 Consequently, the Court concludes that Plaintiff did not lose the  
24 opportunity to present to the Court his claim regarding the alleged  
25 assault. As a result, Plaintiff was not denied access to the  
26 courts with regard to the lawsuit for assault. Defendant's Motion to  
27 Dismiss in this regard is GRANTED.

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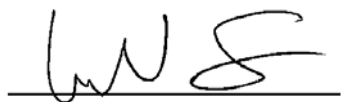
VI

CONCLUSION

The Court, having reviewed Defendants' Motion to Dismiss and Plaintiff's Opposition to the Motion to Dismiss, HEREBY GRANTS Defendants' Motion to Dismiss with leave to amend.

If Plaintiff wishes to further pursue this litigation, he shall file a First Amended Complaint that addresses the deficiencies in his Complaint as noted in this Order. The First Amended Complaint shall be filed on or before October 13, 2010. If Plaintiff does not file a First Amended Complaint on or before the date noted above, the Court shall dismiss this action in its entirety.

DATED: September 13, 2010

  
\_\_\_\_\_  
Hon. William V. Gallo  
U.S. Magistrate Judge