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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GREGORY A. FRANKLIN,  
CDCR #E-66269,

Plaintiff,

vs.

L.E. SCRIBNER, et al.,

Defendants.

Civil No. 09-1067 MMA (RBB)

**ORDER:**

**(1) DISMISSING DEFENDANTS  
AND CLAIMS IN THIRD  
AMENDED COMPLAINT FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO  
28 U.S.C. §§ 1915(e)(2) and 1915A(b);  
AND**

**(2) DIRECTING  
U.S. MARSHAL TO EFFECT  
SERVICE OF THIRD AMENDED  
COMPLAINT ON REMAINING  
DEFENDANTS PURSUANT  
TO FED.R.CIV.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

**I. PROCEDURAL HISTORY**

On May 14, 2009, Plaintiff, Gregory Franklin, a state prisoner currently incarcerated at Calipatria State Prison, located in Calipatria, California and proceeding pro se, filed a civil rights action filed pursuant to 42 U.S.C. § 1983, along with a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). The Court granted Plaintiff’s Motion to Proceed IFP

1 and simultaneously sua sponte dismissed his Complaint for failing to state a claim and as  
2 frivolous pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See* May 29, 2009 Order at 6-7.  
3 Plaintiff was permitted leave to file an Amended Complaint. *Id.* However, Plaintiff instead  
4 chose to file a Notice of Appeal.

5 On August 19, 2009, the United States Court of Appeals for the Ninth Circuit dismissed  
6 the appeal for lack of jurisdiction as the order challenged in the appeal was not file or appealable  
7 [Doc. No. 9]. On December 8, 2009, Plaintiff filed a “Motion to Reinstate Plaintiff’s  
8 Complaint” [Doc. No. 14]. The Court granted this Motion and permitted Plaintiff forty five (45)  
9 days leave to file a First Amended Complaint and cautioned Plaintiff that he must still correct  
10 the deficiencies of pleading identified in the Court’s May 29, 2009 Order. *See* Dec. 10, 2009  
11 Order at 2. Plaintiff filed his First Amended Complaint (“FAC”) on January 13, 2010 [Doc. No.  
12 17]. The Court, once again, dismissed his FAC for failing to state a claim upon which relief  
13 could be granted and permitted Plaintiff leave to file a Second Amended Complaint. *See* Feb.  
14 24, 2010 Order at 5-6. On March 18, 2010, Plaintiff filed his Second Amended Complaint  
15 (“SAC”). The Court dismissed Plaintiff’s Second Amended Complaint for failing to state a  
16 claim and provided Plaintiff with one additional opportunity to file a Third Amended Complaint.  
17 Plaintiff filed his Third Amended Complaint (“TAC”) on May 17, 2010.

## 18 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

19 As the Court informed Plaintiff in its previous Orders, the Prison Litigation Reform Act  
20 (“PLRA”) obligates the Court to review complaints filed by all persons proceeding IFP and by  
21 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,  
22 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions  
23 of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after  
24 docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must  
25 sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous,  
26 malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See*  
27 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)  
28 (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

1 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
2 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
3 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
4 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
5 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of  
6 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection  
7 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
8 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
9 (discussing 28 U.S.C. § 1915A).

10 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
11 allegations of material fact and must construe those facts in the light most favorable to the  
12 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
13 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
14 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
15 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
16 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

17 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
18 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
19 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
20 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*  
21 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d  
22 1350, 1354 (9th Cir. 1985) (en banc).

23 While the Court finds that Plaintiff’s retaliation claims and Eighth Amendment claims  
24 regarding constant illumination survive the sua sponte screening process, the Court must dismiss  
25 Plaintiff’s Fourteenth Amendment due process claims.

26 Throughout Plaintiff’s Third Amended Complaint, he alleges that his Fourteenth  
27 Amendment due process claims were violated during his disciplinary hearings. “The  
28 requirements of procedural due process apply only to the deprivation of interests encompassed

1 by the Fourteenth Amendment’s protection of liberty and property.” *Board of Regents v. Roth*,  
2 408 U.S. 564, 569 (1972). State statutes and prison regulations may grant prisoners liberty  
3 interests sufficient to invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27  
4 (1976). However, the Supreme Court has significantly limited the instances in which due  
5 process can be invoked. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner  
6 can show a liberty interest under the Due Process Clause of the Fourteenth Amendment only if  
7 he alleges a change in confinement that imposes an “atypical and significant hardship . . . in  
8 relation to the ordinary incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*,  
9 131 F.3d 818, 827-28 (9th Cir. 1997).

10 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution  
11 because he has not alleged, as he must under *Sandin*, facts related to the conditions or  
12 consequences of disciplinary hearing which show “the type of atypical, significant deprivation  
13 [that] might conceivably create a liberty interest.” *Id.* at 486. For example, in *Sandin*, the  
14 Supreme Court considered three factors in determining whether the plaintiff possessed a liberty  
15 interest in avoiding disciplinary segregation: (1) the disciplinary versus discretionary nature of  
16 the segregation; (2) the restricted conditions of the prisoner’s confinement and whether they  
17 amounted to a “major disruption in his environment” when compared to those shared by  
18 prisoners in the general population; and (3) the possibility of whether the prisoner’s sentence  
19 was lengthened by his restricted custody. *Id.* at 486-87.

20 Therefore, to establish a due process violation, Plaintiff must first show the deprivation  
21 imposed an atypical and significant hardship on him in relation to the ordinary incidents of  
22 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the  
23 Court could find there were atypical and significant hardships imposed upon him as a result of  
24 the Defendants’ actions.

25 Plaintiff must allege “a dramatic departure from the basic conditions” of his confinement  
26 that would give rise to a liberty interest before he can claim a violation of due process. *Id.* at  
27 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318  
28 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed to allege a liberty

1 interest with regard to his disciplinary hearings, and thus, has failed to state a due process claim.  
2 *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486.

3 Accordingly, Plaintiff's Fourteenth Amendment due process claims are dismissed without  
4 leave to amend pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b).

5 In addition, Plaintiff was cautioned in the Court's previous Orders that any Defendants  
6 not renamed and all claims not re-alleged in the Third Amended Complaint would be deemed  
7 waived. *See Apr. 7, 2010 Order at 7* (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)).  
8 Plaintiff does not re-name Defendants Bertheau, Raske and Thornton in his Third Amended  
9 Complaint and thus, those Defendants are DISMISSED from this action.

10 Finally, as set forth above, the Court finds that Plaintiff's retaliation and Eighth  
11 Amendment claims relating to constant cell illumination are now sufficiently pleaded to survive  
12 the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff  
13 is entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C.  
14 § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in  
15 [IFP] cases."); FED.R.CIV.P. 4(c)(3) ("[T]he court may order that service be made by a United  
16 States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis*  
17 under 28 U.S.C. § 1915."). Plaintiff is cautioned, however, that "the sua sponte screening and  
18 dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6)  
19 motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119  
20 (S.D. Cal. 2007).

### 21 **III. CONCLUSION AND ORDER**

22 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

23 (1) Defendants Bertheau, Raske and Thornton are DISMISSED from this action. *See*  
24 *King*, 814 F.2d at 567. The Clerk of Court is directed to terminate those Defendants from the  
25 docket.

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1 (2) Plaintiff's Fourteenth Amendment due process claims are **DISMISSED** for failing  
2 to state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and  
3 1915A(b).

4 **IT IS FURTHER ORDERED that:**

5 (3) The Clerk shall issue a summons as to Plaintiff's Third Amended Complaint [Doc.  
6 No. 23] upon the remaining Defendants and shall forward it to Plaintiff along with a blank U.S.  
7 Marshal Form 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff  
8 with a certified copy of this Order, the Court's May 29, 2009 Order granting Plaintiff leave to  
9 proceed IFP [Doc. No. 3], and certified copies of his Third Amended Complaint and the  
10 summons for purposes of serving each Defendant. Upon receipt of this "IFP Package," Plaintiff  
11 is directed to complete the Form 285s as completely and accurately as possible, and to return  
12 them to the United States Marshal according to the instructions provided by the Clerk in the  
13 letter accompanying his IFP package. Thereafter, the U.S. Marshal shall serve a copy of the  
14 First Amended Complaint and summons upon each Defendant as directed by Plaintiff on each  
15 Form 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);  
16 FED.R.CIV.P. 4(c)(3).

17 (4) Defendants are thereafter **ORDERED** to reply to Plaintiff's Third Amended  
18 Complaint within the time provided by the applicable provisions of Federal Rule of Civil  
19 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted  
20 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or  
21 other correctional facility under section 1983," once the Court has conducted its sua sponte  
22 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary  
23 determination based on the face on the pleading alone that Plaintiff has a "reasonable  
24 opportunity to prevail on the merits," Defendants are required to respond).

25 (5) Plaintiff shall serve upon Defendants or, if appearance has been entered by  
26 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
27 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
28 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy

1 of any document was served on Defendants, or counsel for Defendants, and the date of service.  
2 Any paper received by the Court which has not been filed with the Clerk or which fails to  
3 include a Certificate of Service will be disregarded.

4 **IT IS SO ORDERED.**

5 DATED: July 13, 2010

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7 Hon. Michael M. Anello  
8 United States District Judge  
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