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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

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

RUBEN DARIO GARCIA, JR.,  
CDCR #J-73373,

Plaintiff,

vs.

SMITH, et al.;

Defendants.

Civil No. 10cv1187 BEN (RBB)

**ORDER:**

**(1) DISMISSING CLAIMS FROM  
SECOND AMENDED COMPLAINT  
FOR FAILING TO STATE A  
CLAIM PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2) AND 1915A(b)  
WITHOUT LEAVE TO AMEND;  
AND**

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

**I.**

**PROCEDURAL HISTORY**

On June 1, 2010, Ruben Dario Garcia ("Plaintiff") and Lenin Garcia, state prisoners currently incarcerated at Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff Ruben Garcia filed a Motion to Proceed *In Forma Pauperis* ("IFP")

1 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. On August 9, 2010, the Court issued an Order  
2 granting Plaintiff Ruben Garcia's Motion to Proceed IFP, dismissing Plaintiff Lenin Garcia and  
3 dismissing the entire Complaint for failing to state a claim upon which relief could be granted.  
4 See Aug. 9, 2010 Order at 7-8.

5 On October 5, 2010, Plaintiff filed his First Amended Complaint. However, the Court,  
6 once again, sua sponte dismissed his First Amended Complaint for failing to state a claim.  
7 See Aug. 9, 2010 Order at 7-8. Plaintiff was granted leave to file a Second Amended Complaint  
8 in order to correct the deficiencies identified by the Court. *Id.* On December 7, 2010, Plaintiff  
9 filed his Second Amended Complaint ("SAC").

## 10 II.

### 11 SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)

12 Notwithstanding IFP status or the payment of any partial filing fees, the Court must  
13 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening  
14 and order the sua sponte dismissal of any case it finds "frivolous, malicious, failing to state a  
15 claim upon which relief may be granted, or seeking monetary relief from a defendant immune  
16 from such relief." 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.  
17 2001) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); *Lopez v.*  
18 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) "not  
19 only permits but requires" the court to sua sponte dismiss an *in forma pauperis* complaint that  
20 fails to state a claim).

21 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte  
22 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as  
23 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to  
24 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing  
25 the U.S. Marshal to effect service pursuant to FED. R. CIV. P. 4(c)(3). See *Calhoun*, 254 F.3d  
26 at 845; *Lopez*, 203 F.3d at 1127; see also *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th  
27 Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur "before service of  
28 process is made on the opposing parties").

1            “[W]hen determining whether a complaint states a claim, a court must accept as true all  
2 allegations of material fact and must construe those facts in the light most favorable to the  
3 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194  
4 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);  
5 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s  
6 pleadings, see *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),  
7 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261  
8 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the  
9 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of*  
10 *Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

11            Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
12 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
13 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
14 United States. See 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122  
15 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

#### 16            **B. Fourteenth Amendment Due Process Claims**

17            Plaintiff alleges that his due process rights were violated during his disciplinary hearing  
18 because several correctional officers falsified rules violation reports which led to Plaintiff being  
19 sentenced to Administrative Segregation (“Ad-Seg”). “The requirements of procedural due  
20 process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s  
21 protection of liberty and property.” *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). State  
22 statutes and prison regulations may grant prisoners liberty interests sufficient to invoke due  
23 process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However, the Supreme  
24 Court has significantly limited the instances in which due process can be invoked. Pursuant to  
25 *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest under the  
26 Due Process Clause of the Fourteenth Amendment only if he alleges a change in confinement  
27 that imposes an “atypical and significant hardship . . . in relation to the ordinary incidents of  
28 prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir.

1 1997).

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

12 Therefore, to establish a due process violation, Plaintiff must first show the deprivation  
13 imposed an atypical and significant hardship on him in relation to the ordinary incidents of  
14 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the  
15 Court could find there were atypical and significant hardships imposed upon him as a result of  
16 the Defendants’ actions. Plaintiff must allege “a dramatic departure from the basic conditions”  
17 of his confinement that would give rise to a liberty interest before he can claim a violation of due  
18 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*  
19 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed  
20 to allege a liberty interest in remaining free of Ad-seg, and thus, has failed to state a due process  
21 claim. *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486 (holding that  
22 placing an inmate in administrative segregation for thirty days “did not present the type of  
23 atypical, significant deprivation in which a state might conceivably create a liberty interest.”).

24 Thus, Plaintiff’s Fourteenth Amendment due process claims are dismissed from this  
25 action without leave to amend for failing to state a claim upon which relief may be granted.

26 **C. Eighth Amendment conditions of confinement claims**

27 Plaintiff also briefly mentions that his right to be free from cruel and unusual punishment  
28 under the Eighth Amendment have been violated but offers no other facts to support this claim.

1 The Eighth Amendment, which prohibits “cruel and unusual punishments,” imposes a duty on  
2 prison officials to provide humane conditions of confinement and to take reasonable measures  
3 to guarantee the safety of the inmates. *Helling v. McKinney*, 509 U.S. 25, 31-33 (1993); *see also*  
4 *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (noting that the U.S. Constitution “does not  
5 mandate comfortable prisons.”).

6 Thus, to assert an Eighth Amendment claim for deprivation of humane conditions of  
7 confinement a prisoner must satisfy two requirements: one objective and one subjective. *Farmer*  
8 *v. Brennan*, 511 U.S. 825, 834 (1994); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994). Under  
9 the objective requirement, the plaintiff must allege facts sufficient to show that “a prison  
10 official’s acts or omissions . . . result[ed] in the denial of the ‘minimal civilized measure of life’s  
11 necessities.’” *Farmer*, 511 U.S. at 834 (quoting *Rhodes*, 452 U.S. at 347). This objective  
12 component is satisfied so long as the institution “furnishes sentenced prisoners with adequate  
13 food, clothing, shelter, sanitation, medical care, and personal safety.” *Hoptowit v. Ray*, 682 F.2d  
14 1237, 1246 (9th Cir. 1982); *Farmer*, 511 U.S. at 534; *Wright v. Rushen*, 642 F.2d 1129, 1132-33  
15 (9th Cir. 1981). The subjective requirement, relating to the defendant’s state of mind, requires  
16 that the plaintiff allege facts sufficient to show “deliberate indifference.” *Allen*, 48 F.3d at 1087.  
17 “Deliberate indifference” exists when a prison official “knows of and disregards an excessive  
18 risk to inmate health and safety; the official must be both aware of facts from which the  
19 inference could be drawn that a substantial risk of serious harm exists, and he must also draw  
20 the inference.” *Farmer*, 511 U.S. at 837.

21 As currently pleaded, the Court finds that Plaintiff alleges no facts to find that any named  
22 Defendants was deliberately indifferent to a risk to his health or safety. Accordingly, Plaintiff’s  
23 Eighth Amendment claims are dismissed for failing to state a claim upon which § 1983 relief can  
24 be granted without leave to amend.

#### 25 **D. Access to Courts claim**

26 Prisoners do “have a constitutional right to petition the government for redress of their  
27 grievances, which includes a reasonable right of access to the courts.” *O’Keefe v. Van Boening*,  
28 82 F.3d 322, 325 (9th Cir. 1996); *accord Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995).

1 In *Bounds*, 430 U.S. at 817, the Supreme Court held that “the fundamental constitutional right  
2 of access to the courts requires prison authorities to assist inmates in the preparation and filing  
3 of meaningful legal papers by providing prisoners with adequate law libraries or adequate  
4 assistance from persons who are trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977).  
5 To establish a violation of the right to access to the courts, however, a prisoner must allege facts  
6 sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions  
7 of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a  
8 result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual  
9 prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing  
10 deadline or to present a claim.” *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir.  
11 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093  
12 (9th Cir. 1996).

13 Here, Plaintiff has failed to alleged any actions with any particularity that have *precluded*  
14 his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or  
15 sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right to  
16 access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly  
17 or collaterally, and ... to challenge the conditions of [his] confinement.”); *see also Christopher*  
18 *v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous nature of the “underlying cause of  
19 action, whether anticipated or lost, is an element that must be described in the complaint, just as  
20 much as allegations must describe the official acts frustrating the litigation.”). Moreover,  
21 Plaintiff has not alleged facts sufficient to show that he has been actually injured by any specific  
22 defendant’s actions. *Lewis*, 518 U.S. at 351.

23 In short, Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that  
24 he was “so stymied” by any individual defendant’s actions that “he was unable to even file a  
25 complaint,” direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*,  
26 518 U.S. at 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ...  
27 the predicate claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show  
28 that the ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s

1 access to courts claims must be dismissed for failing to state a claim upon which section 1983  
2 relief can be granted without leave to amend.

3 **E. Remaining claims**

4 Finally, the Court finds Plaintiff's allegations of retaliation, conspiracy and equal  
5 protection are sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2)  
6 and 1915A(b). *See Lopez*, 203 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled  
7 to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) ("The officers of the court shall  
8 issue and serve all process, and perform all duties in [IFP] cases."); FED. R. CIV. P. 4(c)(3)  
9 ("[T]he court may order that service be made by a United States marshal or deputy marshal ...  
10 if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915."). Plaintiff  
11 is cautioned that "the sua sponte screening and dismissal procedure is cumulative of, and not a  
12 substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring." *Teahan*  
13 *v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

14 **III.**

15 **CONCLUSION AND ORDER**

16 Good cause appearing, **IT IS HEREBY ORDERED** that:

17 1. Plaintiff's access to courts, Eighth Amendment and Fourteenth Amendment due  
18 process claims are **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and  
19 1915A(b). Because the Court finds amendment of these claims would be futile, leave to amend  
20 is **DENIED**. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a  
21 leave to amend is not an abuse of discretion where further amendment would be futile).

22 **IT IS FURTHER ORDERED that:**

23 2. The Clerk shall issue a summons as to Plaintiff's Second Amended Complaint  
24 [Doc. No. 16] upon Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal  
25 Form 285 for each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy  
26 of this Order and a certified copy of his Second Amended Complaint and the summons so that  
27 he may serve Defendants. Upon receipt of this "IFP Package," Plaintiff is directed to complete  
28 the Form 285s as completely and accurately as possible, and to return them to the United States

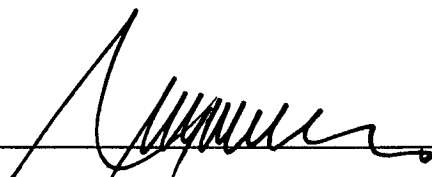
1 Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP  
2 package. Upon receipt, the U.S. Marshal shall serve a copy of the Complaint and summons upon  
3 Defendants as directed by Plaintiff on the USM Form 285s. All costs of service shall be  
4 advanced by the United States. *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

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

13 4. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
14 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
15 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
16 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
17 of any document was served on Defendants, or counsel for Defendants, and the date of service.  
18 Any paper received by the Court which has not been filed with the Clerk or which fails to  
19 include a Certificate of Service will be disregarded.

20  
21 **IT IS SO ORDERED.**

22 DATED: 2-03-2011



23 **HON. ROGER T. BENITEZ**  
24 United States District Judge