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

TYRONE ROGERS,  
CDCR #CV-35389;  
MICHAEL ANTHONY LOPEZ,  
CDCR #H-30604

Plaintiffs,

vs.

G.J. GIURBINO, URIBE DOMINGO, JR.;  
N. GRANNIS; M. HODGES; DENNIS  
BROWN; ALICIA GARCIA; L. KASTNER;  
M. AYALA; B. NARVIS; D. FOSTON,

Defendants.

Civil No. 11cv0666 BTM (PCL)

**ORDER:**

**(1) SEVERING CLAIMS AND PARTIES  
PURSUANT TO FED.R.CIV.P. 21;**

**(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
[ECF No. 3];**

**(3) GRANTING PLAINTIFF  
ROGERS' MOTION TO PROCEED  
IN FORMA PAUPERIS [ECF No. 4],  
AND**

**(4) DISMISSING ACTION PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2) & 1915A**

Plaintiffs, both inmates currently incarcerated at the Centinela State Prison, and proceeding pro se, have filed a civil action pursuant to 42 U.S.C. § 1983. Plaintiffs have also have filed Motions to Proceed *In Forma Pauperis* (“IFP”), along with a Motion to Appoint Counsel.

1 **I.**

2 **FEDERAL RULE OF CIVIL PROCEDURE 21**

3 As an initial matter, the Court notes that this action has been filed by two separate  
4 Plaintiffs who are currently incarcerated in the same institution. It is often the case during the  
5 course of litigation filed by those who are incarcerated, that a plaintiff will transfer to different  
6 institutions. If Plaintiffs were to be separated, which is a high probability, they would not be  
7 able to represent the interests of the other party. Because Plaintiffs are proceeding pro se, they  
8 have no authority to represent the legal interest of any other party. *See Cato v. United States*,  
9 70 F.3d 1103, 1105 n.1 (9th Cir. 1995); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696,  
10 697 (9th Cir. 1987); *see also* FED.R.CIV.P. 11(a) (“Every pleading, written motion, and other  
11 paper shall be signed by at least one attorney of record in the attorney’s original name, or if the  
12 party is not represented by an attorney, shall be signed by the party.”). Thus, to attempt to  
13 litigate this action together in one action would lead to a great deal of procedural confusion and  
14 likely result in significant delays. Thus, the Court severs the claims brought by Plaintiff Lopez  
15 from this action pursuant to FED.R.CIV.P. 21.

16 The Court will permit Plaintiff Rogers to proceed in this action and directs the Clerk of  
17 Court to open a new action with the Complaint [ECF No. 1], along with Plaintiff Lopez’s Motion  
18 to Proceed *IFP* [ECF No. 2].

19 **II.**

20 **MOTION TO PROCEED IFP [ECF No. 2]**

21 All parties instituting any civil action, suit or proceeding in a district court of the United  
22 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
23 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee  
24 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
25 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to  
26 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their  
27 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d  
28 844, 847 (9th Cir. 2002).

1 The Court finds that Plaintiff has no available funds from which to pay filing fees at this  
2 time. See 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed  
3 IFP [ECF No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,  
4 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk  
5 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

### 6 III.

#### 7 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)

8 Notwithstanding IFP status or the payment of any partial filing fees, the Court must  
9 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening  
10 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a  
11 claim upon which relief may be granted, or seeking monetary relief from a defendant immune  
12 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.  
13 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*  
14 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc). “[W]hen determining whether a  
15 complaint states a claim, a court must accept as true all allegations of material fact and must  
16 construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443,  
17 447 (9th Cir. 2000).

18 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
19 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
20 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
21 United States. See 42 U.S.C. § 1983.

#### 22 A. Legal Mail

23 Plaintiff’s allegations are far from clear. However, Plaintiff alleges that he was “denied  
24 opportunity to receive legal mail at Centinela State Prison” on July 11, 2007. (Compl. at 4.)  
25 Plaintiff fails to identify the party whom he claims is directly responsible for this alleged denial.  
26 In his Complaint, Plaintiff refers to the Petition for Writ of Habeas Corpus challenging his  
27 underlying criminal conviction that he filed in *Rogers v. Giurbino, et al.*, 06cv2549 H (NLS).  
28 A court “may take notice of proceedings in other courts, both within and without the federal

1 judicial system, if those proceedings have a direct relation to matters at issue.” *United States*  
2 *ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).  
3 In this matter, District Judge Marilyn Huff denied Plaintiff’s Petition on July 11, 2007 which is  
4 apparently the legal mail Plaintiff claims he was “denied the opportunity to receive.” (Compl.  
5 at 4.) However, Plaintiff cannot state a claim on the basis that he did not receive mail from the  
6 Courts. *See Keenan v. Hall*, 83 F.3d 1083, 1094 (9th Cir. 1996) (“Mail from the courts, as  
7 contrasted to mail from a prisoner’s lawyer, is not legal mail.”)

8 **B. Access to Courts**

9 Plaintiff also appears to claim that he was denied adequate access to the courts. In  
10 *Bounds*, 430 U.S. at 817, the Supreme Court held that “the fundamental constitutional right of  
11 access to the courts requires prison authorities to assist inmates in the preparation and filing of  
12 meaningful legal papers by providing prisoners with adequate law libraries or adequate  
13 assistance from persons who are trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977).  
14 To establish a violation of the right to access to the courts, however, a prisoner must allege facts  
15 sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions  
16 of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a  
17 result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual  
18 prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing  
19 deadline or to present a claim.” *Id.* at 348.

20 Here, Plaintiff first describes three separate actions he filed in the Southern District of  
21 California in which he filed Petitions for Writ of Habeas Corpus challenging his underlying  
22 criminal conviction. The first Petition, as stated above, was denied by the Court on July 11,  
23 2007 (*See Rogers v. Giurbino, et al.* 06cv2549 H (NLS) July 11, 2007 Order Adopting Report  
24 and Recommendation and Denying Petition for Writ of Habeas Corpus). Plaintiff does not  
25 allege that any of the named Defendants interfered with his ability to litigate that matter. In fact,  
26 the Court notes that Plaintiff filed objections to the Magistrate Judge’s Report and  
27 Recommendation and was able to file a Notice of Appeal.

28

1           The second Petition was filed in *Rogers v. Giurbino, et al.*, 07cv1839 H (PCL). In that  
2 matter, District Judge Huff dismissed Plaintiff’s petition without prejudice finding that it was  
3 second or successive to the petition Plaintiff filed in 2006. Plaintiff was instructed to submit a  
4 form application, which was provided, to the Ninth Circuit Court of Appeals seeking leave to  
5 file a second or successive petition. (*See Rogers v. Giurbino, et al.*, 07cv1839 H (PCL) Order  
6 Adopting Report and Recommendation and Dismissing, without prejudice, Petition for Writ of  
7 Habeas Corpus dated Mar. 10, 2008).

8           Plaintiff does not claim that any of the named Defendants interfered with his litigation  
9 of the matter filed in 2007. Plaintiff does not state in his Complaint whether he filed this form  
10 application with the Ninth Circuit, instead Plaintiff alleges that on January 3, 2009 he “filed the  
11 unexhausted claim in the San Diego Superior Court concerning the denial of this Court’s 7-11-  
12 07, case no. 06-CV-2549.” (Compl. at 5.) Plaintiff then filed a petition with the California  
13 Supreme Court on July 30, 2009 which was denied on December 28, 2009. (*Id.*)

14           Plaintiff’s claims he was denied access to the Courts on February 26, 2010 because he  
15 was not permitted access to the law library to research the denial of his petition by the California  
16 Supreme Court. (*Id.*) Plaintiff was then able to file his third petition challenging his underlying  
17 criminal conviction in the Southern District on March 30, 2010. Once again, Plaintiff’s petition  
18 was dismissed as second or successive. Plaintiff was again told that he must obtain an order  
19 from the Ninth Circuit Court of Appeals granting him permission to file a second or successive  
20 petition and he was supplied with the necessary form. (*See Rogers v. Domingo, et al.*, 10cv0707  
21 MMA (BLM) Summary Dismissal of Successive Petition Pursuant to 28 U.S.C. § 2244(b)(3)(A)  
22 Gatekeeper Provision dated Apr. 26, 2010). Plaintiff’s second claim that he was denied access  
23 comes after this dismissal was filed whereby he claims that he was denied access to the law  
24 library on May 6, 2010 to research filing a “writ of habeas corpus (brief) to the United States  
25 Ninth Circuit Court, FRAP 31(a)(1).” (Compl. at 5.)

26           While not entirely clear, it appears that Plaintiff claims the Ninth Circuit Court of Appeals  
27 rejected his attempts to file his second or successive petition because of a lack of “diligence”  
28 caused by prison officials refusal to allow him to use the law library in 2010. (*Id.* at 5-6.)

1 However, a review of Plaintiff’s filings with the Ninth Circuit Court of Appeal demonstrate that  
2 Plaintiff filed an application for leave to file a second or successive petition on November 28,  
3 2007. *See Rogers v. Almager, et al.*, No. 07-74653 (9th Cir. Nov. 29, 2007). This application  
4 was denied by the Ninth Circuit Court of Appeals on January 15, 2008, well before Plaintiff’s  
5 claims that he was denied access to the prison’s law library.

6 Thus, the Court finds that Plaintiff has failed to alleged any actions with any particularity  
7 that have *precluded* his pursuit of a non-frivolous direct or collateral attack upon either his  
8 criminal conviction or sentence or the conditions of his current confinement. *See Lewis*, 518  
9 U.S. at 355 (right to access to the courts protects only an inmate’s need and ability to “attack  
10 [his] sentence[], directly or collaterally, and ... to challenge the conditions of [his]  
11 confinement.”); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous  
12 nature of the “underlying cause of action, whether anticipated or lost, is an element that must be  
13 described in the complaint, just as much as allegations must describe the official acts frustrating  
14 the litigation.”). Therefore, the Court finds that Plaintiff has failed to state an access to courts  
15 claim.

#### 16 IV.

#### 17 CONCLUSION AND ORDER

18 For the reasons set forth above, **IT IS ORDERED** that:

19 (1) The claims brought by Plaintiff Lopez are severed from this action pursuant to  
20 FED.R.CIV.P. 21. Plaintiff Rogers shall proceed as the sole Plaintiff in this action.

21 (2) The Clerk of Court is directed to open a new civil action with the Complaint [ECF  
22 No. 1] with Michael Anthony Lopez as the Plaintiff and file Lopez’ Motion to Proceed *IFP*  
23 [ECF No. 2], along with his Motion to Appoint Counsel [ECF No. 3] in the separate action.

24 **IT IS FURTHER ORDERED that:**

25 (3) Plaintiff Rogers Motion to Appoint Counsel is **DENIED** without prejudice.

26 (4) Plaintiff’s Motion to proceed *IFP* pursuant to 28 U.S.C. § 1915(a) [ECF No. 3] is  
27 **GRANTED.**

28

1 (5) The Secretary of California Department of Corrections and Rehabilitation, or his  
2 designee, shall collect from Plaintiff Rogers' prison trust account the \$350 balance of the filing  
3 fee owed in this case by collecting monthly payments from the account in an amount equal to  
4 twenty percent (20%) of the preceding month's income and forward payments to the Clerk of  
5 the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C.  
6 § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND  
7 NUMBER ASSIGNED TO THIS ACTION.

8 (6) The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,  
9 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
10 Sacramento, California 95814.

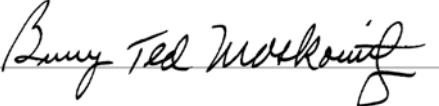
11 **IT IS FURTHER ORDERED** that:

12 (7) Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
13 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
14 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all  
15 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in  
16 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants  
17 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been  
18 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

19 (8) The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

20 **IT IS SO ORDERED.**

21  
22  
23 DATED: May 17, 2011

24   
25 Honorable Barry Ted Moskowitz  
26 United States District Judge  
27  
28