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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

JAMES EUSSE, Jr.
CDCR #K-75382,

Plaintiff,

vs.

MARCO VITELA; EVARISTO
DUARTE; MARTIN CARPIO; ROGER
N. NELSON, Jr.,

Defendants.

Civil No. 13cv0916 BEN (NLS)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
(ECF No. 5);**

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT TO
28 U.S.C. § 1915(e)(2)**

James Eusse, Jr. ("Plaintiff"), a state inmate currently housed at Centinela State Prison, and proceeding pro se, has filed this civil action pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 5).

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I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). As defined by the PLRA, a "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h). Because Plaintiff is currently incarcerated, he is a prisoner as defined by 28 U.S.C. § 1915(h), and therefore subject to the PLRA's requirements and limitations.

Plaintiff has submitted a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. The Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 5), and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II.

SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail

1 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
2 §§ 1915(e)(2)(B) & 1915A.

3 “[W]hen determining whether a complaint states a claim, a court must accept as
4 true all allegations of material fact and must construe those facts in the light most
5 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
6 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)
7 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts
8 “have an obligation where the petitioner is pro se, particularly in civil rights cases, to
9 construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”
10 *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773
11 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential
12 elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of*
13 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official
14 participation in civil rights violations are not sufficient to withstand a motion to
15 dismiss.” *Id.*

16 **A. Fourth Amendment Claims**

17 While not entirely clear, it appears that Plaintiff is claiming that his Fourth
18 Amendment rights were violated when his cell was searched. (*See* Compl. at 3.)
19 However, the Supreme Court has held that the “Fourth Amendment prescription against
20 unreasonable searches does not apply within the confines of the prison cell.” *Hudson*
21 *v. Palmer*, 468 U.S. 517, 525-26 (1984). A prisoner has no expectation of privacy in his
22 prison cell. *Id.* Accordingly, Plaintiff’s Fourth Amendment claims are dismissed for
23 failing to state a claim.

24 **B. Fourteenth Amendment Claims**

25 Plaintiff claims that his Fourteenth Amendment rights were violated when he was
26 housed in administrative segregation (“Ad-Seg”). (*See* Compl. at 5-7.) “The
27 requirements of procedural due process apply only to the deprivation of interests
28 encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd.*

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

10 In this case, Plaintiff has failed to establish a liberty interest protected by the
11 Constitution because he has not alleged, as he must under *Sandin*, facts related to the
12 conditions in Ad-Seg which show “the type of atypical, significant deprivation [that]
13 might conceivably create a liberty interest.” *Sandin*, 515 U.S. at 486. For example, in
14 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
15 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary
16 versus discretionary nature of the segregation; (2) the restricted conditions of the
17 prisoner’s confinement and whether they amounted to a “major disruption in his
18 environment” when compared to those shared by prisoners in the general population; and
19 (3) the possibility of whether the prisoner’s sentence was lengthened by his restricted
20 custody. *Id.* at 486-87.

21 Therefore, to establish a due process violation, Plaintiff must first show the
22 deprivation imposed an atypical and significant hardship on him in relation to the
23 ordinary incidents of prison life. *Id.* at 483-84. Plaintiff has failed to allege any facts
24 from which the Court could find there were atypical and significant hardships imposed
25 upon him as a result of the Defendants’ actions. Plaintiff must allege “a dramatic
26 departure from the basic conditions” of his confinement that would give rise to a liberty
27 interest before he can claim a violation of due process. *Id.* at 485; *see also Keenan v.*
28 *Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998).

1 He has not; therefore the Court finds that Plaintiff has failed to allege a liberty interest
2 in remaining free of Ad-seg, and thus, has failed to state a due process claim. *See May*,
3 109 F.3d at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486 (holding that placing
4 an inmate in administrative segregation for thirty days “did not present the type of
5 atypical, significant deprivation in which a state might conceivably create a liberty
6 interest.”).

7 C. Claims Under State Law

8 Plaintiff also seeks to hold Defendants liable for allegedly providing false
9 testimony in his criminal proceedings pursuant to California Penal Code § 118.1
10 (*See Compl. at 7.*) This penal code section provides, in part, that any peace officer who
11 files a report that the “officer knows to be false” is punishable by “imprisonment in the
12 county jail for up to one year, or in the state prison for one, two, or three years.” Cal.
13 Penal Code § 118.1. However, this statute does not “create private rights of action.”
14 *Willis v. City of Los Angeles*, 57 Fed. App’x 283, 289 (9th Cir. 2002). Thus, these claims
15 are dismissed for failing to state a claim without leave to amend.

16 For all the reasons set forth above, the Court must **DISMISS** Plaintiff’s Complaint
17 but will provide Plaintiff with the opportunity to amend his Complaint to correct the
18 deficiencies of pleading identified by the Court.

19 III.

20 CONCLUSION AND ORDER

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

22 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No.
23 5) is **GRANTED**.

24 2. The Secretary of California Department of Corrections and Rehabilitation,
25 or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the
26 filing fee owed in this case by collecting monthly payments from the account in an
27 amount equal to twenty percent (20%) of the preceding month’s income and forward
28 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in

1 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
2 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

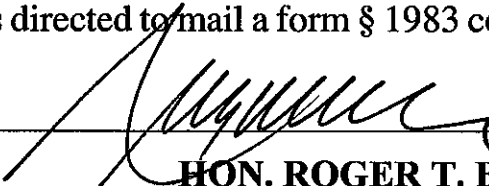
3 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
4 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S
5 Street, Suite 502, Sacramento, California 95814.

6 **IT IS FURTHER ORDERED** that:

7 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which
8 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However,
9 Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in
10 which to file a First Amended Complaint which cures all the deficiencies of pleading
11 noted above. Plaintiff's Amended Complaint must be complete in itself without
12 reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named
13 and all claims not re-alleged in the Amended Complaint will be deemed to have been
14 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's
15 Amended Complaint fails to state a claim upon which relief may be granted, it may be
16 dismissed without further leave to amend and may hereafter be counted as a "strike"
17 under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir.
18 1996).

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

20 DATED: 7/16/13

21 
22 **HON. ROGER T. BENITEZ**
23 United States District Judge