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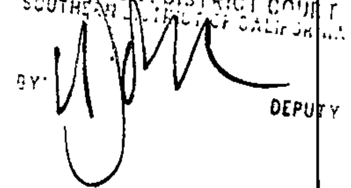


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ISAAC KIGONDU KINITI,

Plaintiff,

vs.

CORRECTIONAL CORPORATION OF AMERICA, WARDEN BARBARA WAGNER, DETENTION OFFICERS HARPER, ALVAREZ, WINTERS, PAYNE AND TERAN,

Defendants.

Civil No. 05cv1013-DMS (PCL)

ORDER:

(1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS;

(2) SUA SPONTE DISMISSING ALL CLAIMS AGAINST ALL DEFENDANTS WITHOUT PREJUDICE PER 28 U.S.C. § 1915(e)(2), WITH THE EXCEPTION OF PLAINTIFF'S FIFTH AMENDMENT CLAIM AGAINST DEFENDANTS ALVAREZ AND PAYNE AND RETALIATION CLAIM AGAINST DEFENDANT TERAN; AND,

(3) GRANTING LEAVE TO AMEND COMPLAINT OR, ALTERNATELY, LEAVE TO REQUEST SERVICE OF THE COMPLAINT AS TO DEFENDANTS ALVAREZ, PAYNE AND TERAN ONLY

Plaintiff, a "temporary room and board civil detainee" housed at the San Diego Correctional Facility at the time of the events giving rise to this action, and currently housed at the El Centro Detention Facility, proceeding pro se, has submitted a civil rights Complaint pursuant to 42 U.S.C. § 1983, along with a motion to proceed in forma pauperis. Plaintiff claims

that the Correctional Corporation of America ("CCA"), a private corporation which has contracted with the United States Bureau of Immigration and Customs Enforcement to operate the San Diego Correctional Facility, and several CCA employees in their individual and official capacities as detention officers, subjected Plaintiff to conditions of confinement which violated his rights under the First, Fifth, Eighth and Fourteenth Amendments. (Compl. at 1-23.) Plaintiff seeks monetary damages and injunctive relief. (Id. at 26.)

For the following reasons, the Court finds that Plaintiff's Complaint fails to state a claim upon which relief may be granted as to any Defendant, with the exception of a Fifth Amendment claim against Defendants Alvarez and Payne and a retaliation claim against Defendant Teran. The Court therefore sua sponte dismisses all claims in the Complaint with the exception of the Fifth Amendment and retaliation claims. The Court will notify Plaintiff of the pleading deficiencies of the dismissed claims and grant Plaintiff leave to file a First Amended Complaint in which he attempts to cure some or all of those pleading deficiencies. If Plaintiff does not wish to file an amended complaint, he may request the Court to order the United States Marshal to serve the original Complaint (which now contains only Fifth Amendment and retaliation claims) on Defendants Alvarez, Payne and Teran, and forfeit any opportunity to later amend the Complaint to present the claims dismissed in this Order.

I. Consent to Magistrate Judge per Local Civil Rule 72.3

This case has been referred to the Honorable Magistrate Judge Peter C. Lewis pursuant to Local Rule 72.3, "Assignment of § 1983 Prisoner Civil Cases to United States Magistrate Judges" and 28 U.S.C. § 636(b)(1). Unless all parties to this action file written consent to magistrate judge jurisdiction, Magistrate Judge Lewis will conduct all necessary post-service hearings and submit proposed findings of fact and recommendations for the disposition of all motions in this matter excluded from magistrate judge jurisdiction by 28 U.S.C. § 636(b)(1)(a). See S. D. CAL. CIVLR 72.3(e); Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997) and Nasca v. Peoplesoft, 160 F.3d 578, 580 (9th Cir. 1999) (both holding that magistrate judge has no jurisdiction to hear case when record contains no written consent of the parties); FED.R.CIV.P. 73(b); 28 U.S.C. § 636(c)(1).

1 **II. Motion to Proceed In Forma Pauperis ("IFP")**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of $250. See 28
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee
5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See
6 Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999). However, "[u]nlike other indigent
7 litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and
8 appeals pursuant to the PLRA [Prison Litigation Reform Act]." Agyeman v. INS, 296 F.3d 871,
9 886 (9th Cir. 2002). As defined by the PLRA, a "prisoner" is "any person incarcerated or
10 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent
11 for, violations of criminal law or the terms and conditions of parole, probation, pretrial release,
12 or diversionary program." 28 U.S.C. § 1915(h). Under this definition, "an alien detained by the
13 INS pending deportation is not a 'prisoner' within the meaning of the PLRA," because
14 deportation proceedings are civil, rather than criminal in nature, and an alien detained pending
15 deportation has not necessarily been "accused of, convicted of, sentenced or adjudicated
16 delinquent for, a violation of criminal law." Agyeman, 296 F.3d at 886.

17 Thus, because Plaintiff claims he is civilly detained pursuant to immigration proceedings,
18 and not a "prisoner" as defined by 28 U.S.C. § 1915(h), the filing fee provisions of 28 U.S.C.
19 § 1915(b) do not apply to him. Accordingly, the Court has reviewed Plaintiff's affidavit of
20 assets, just as it would for any other non-prisoner litigant seeking IFP status, and finds it is
21 sufficient to show that he is unable to pay the fees or post securities required to maintain this
22 action. See S.D. CAL. CIVLR 3.2(d). Accordingly, the Court **GRANTS** Plaintiff's Motion to
23 Proceed IFP pursuant to 28 U.S.C. § 1915(a).

24 **III. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2)**

25 A complaint filed by any person proceeding in forma pauperis is subject to sua sponte
26 dismissal to the extent it is "frivolous, malicious, fail[s] to state a claim upon which relief may
27 be granted, or seek[s] monetary relief from a defendant immune from such relief." 28 U.S.C.
28 § 1915(e)(2)(B); Calhoun v. Stahl, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam) (holding that

1 "the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); Lopez v. Smith, 203
2 F.3d 1122, 1127 (9th Cir. 2000) (en banc) ("[S]ection 1915(e) not only permits, but requires a
3 district court to dismiss an in forma pauperis complaint that fails to state a claim.").

4 "[W]hen determining whether a complaint states a claim, a court must accept as true all
5 allegations of material fact and must construe those facts in the light most favorable to the
6 plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000); see also Barren v. Harrington,
7 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) "parallels the language of Federal Rule of
8 Civil Procedure 12(b)(6)."). However, while liberal construction is "particularly important in
9 civil rights cases," Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992), the Court may not
10 "supply essential elements of the claim that were not initially pled." Ivey v. Board of Regents
11 of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). The district court should grant
12 leave to amend, however, unless it determines that "the pleading could not possibly be cured by
13 the allegation of other facts" and if it appears "at all possible that the plaintiff can correct the
14 defect." Lopez, 203 F.3d at 1130-31.

15 **A. Allegations in the Complaint**

16 Plaintiff alleges that he arrived at the San Diego Correctional Facility ("SDCF") as a
17 "temporary room and board civil detainee" on November 3, 2004. (Compl at 6.) Plaintiff states
18 that he was denied a meal the next day, and the day after that was assigned a cellmate with whom
19 he was not compatible because they did not speak the same language and because the person had
20 a habit of throwing used toilet paper containing excrement in the wastebasket rather than
21 flushing it down the toilet, which caused an unbearable smell. (Id. at 6-7.) Plaintiff contends
22 the Defendants' failure to check the compatibility of cellmates poses a risk of violence between
23 the detainees. (Id. at 7.)

24 Plaintiff alleges the policy of the Correctional Corporation of America ("CCA") of
25 housing three detainees in a tiny cell designed to accommodate only two persons compounds the
26 problem of a risk of violence from cellmate incompatibility. (Id.) He also contends that the third
27 person in each cell must sleep on the floor with his head next to the toilet, and that person is
28 urinated on and awakened by the flushing sound whenever anyone uses the toilet at night. (Id.

at 7-8.) Plaintiff states that he slept on the floor the entire time he was housed at SDCF, and was required to remain in his cell between 16 and 22 hours per day. (Id.) Plaintiff contends CCA maintains overcrowded conditions in order to maximize their profits. (Id. at 8.)

Plaintiff alleges he wrote a number of grievances regarding the conditions of his confinement, and was told by Defendant Harper, the Unit Manager, to stop writing grievances, and was warned by other detainees that he could be put in isolation for writing grievances. (Id. at 9.) Plaintiff, who identifies himself as Black, states that he was verbally abused and harassed by the detention officers, and was placed in segregation for verbally interfering with a head count, whereas a Caucasian detainee who physically interfered with the same count was not placed in isolation. (Id. at 10-11.) Plaintiff states that there was a delay of one hour before he was given blankets and clothing to keep warm when he was placed in the segregation unit, and that the temperature was cold because the air conditioner was on maximum. (Id. at 11-12.) He and the other detainees complained of the cold temperature during the entire time he was in segregation and requested additional blankets, but was told that it was the policy of the CCA that detainees are issued only one blanket. (Id. at 12.) Plaintiff was issued a disciplinary report for blocking the air vent with toilet paper so as to prevent the cold air from blowing on him, and states that he developed a cough and cold and body pains from sleeping in a fetal position in an attempt to keep warm. (Id. at 12-13.)

Plaintiff states that it was seven days before he was given a hearing on the disciplinary charges which led to his placement in segregation, was not provided with an investigative summary before, during or after the hearing, and his request to call witnesses was refused. (Id. at 13-14.) Plaintiff alleges that Defendant Teran, a detention officer, vindictively submitted a false affidavit at the disciplinary proceedings because he and Plaintiff had been involved in a prior verbal altercation. (Id. at 13.) In addition, Plaintiff states that although the detainee's handbook listed the offense for which Plaintiff was found guilty as carrying a maximum sentence of 3 days in segregation, Defendant detention officer Winters sentenced him to 36 days in segregation in order to please Winters' boss, Defendant detention officer Harper. (Id. at 14-15.) Plaintiff alleges that Harper, Winters and Teran conspired to punish him for filing

grievances and prevent him from filing more grievances, and that he was transferred before he could appeal the decision. (Id. at 15-17.) Plaintiff states that the cells are so small that it is difficult for three people to stand up at the same time, and, being the person relegated to sleeping on the floor, he often refused to stand during the count, and had been charged with interfering with the count by not standing when told to on many other occasions, but he states that this incident was the first time the infraction was charged as a serious offense, which he contends demonstrates the Defendants were acting in retaliation for his filing grievances. (Id.)

Plaintiff alleges that the conditions in segregation were inhumane, degrading, unsafe and unsanitary. (Id. at 17-20.) He states that his toilet overflowed and was not fixed for almost five days, that his request to be moved to one of many other empty cells was denied even though another detainee's request for a new cell was granted simply because that detainee did not like his cell, that Plaintiff's legal mail was opened outside his presence, that he went on a hunger strike for four days and Defendants Payne and Alvarez made bets on when he would eat next, that he had to trust that the officers would file his grievances and is unsure how many were actually filed, that he was locked in the cell 24 hours per day with constant illumination which deprived him of sleep, and that he did not have enough blankets to keep warm. (Id.)

B. Plaintiff's 1983 Complaint must be construed as a Bivens action.

It is clear that Plaintiff is unable to state a claim as to any named defendant pursuant to 42 U.S.C. § 1983. There is no valid basis for a claim under section 1983, in that Plaintiff's allegations are against federal and "private" officials acting under color of federal law. Section 1983 provides a remedy only for deprivation of constitutional rights by persons acting under color of state law. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Thus, when a plaintiff seeks damages for violation of his constitutional rights by a federal actor, "the only possible action is an action under the authority of" Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (establishing that constitutionally protected interests may be vindicated through a suit for damages against persons acting under color of federal law by invoking the general federal question jurisdiction of the federal courts). See Daly-Murphy, 837 F.2d at 355.

In Bivens, the Supreme Court granted victims of constitutional violations by federal agents the right to recover damages in federal court. Bivens, 403 U.S. at 397. Here, Plaintiff seeks damages for constitutional violations against CCA, and against various officials employed by CCA as detention officers in their individual and official capacities, on the basis that CCA is a private security corporation contracted to provide security services at the SDCF by the United States Bureau of Immigration and Customs Enforcement. (Compl. at 2-5.) Thus, the Court will construe Plaintiff's section 1983 action as one brought pursuant to Bivens.

C. Bivens claims

Plaintiff asserts Bivens claims against all Defendants under the First, Fifth, Eighth and Fourteenth Amendments for violations of his rights to due process, equal protection, access to the courts, right to petition for redress of his grievances, and to be free from intentional deliberate indifference to his personal health and safety and from the infliction of physical and mental anguish by cruel and unusual punishment. (Compl. at 22.) "*Bivens* established that compensable injury to a constitutionally protected interest [by federal officials alleged to have acted under color of federal law] could be vindicated by a suit for damages invoking the general federal-question jurisdiction of the federal courts [pursuant to 28 U.S.C. § 1331]." Butz v. Economou, 438 U.S. 478, 486 (1978). "Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991). To state a private cause of action under Bivens, Plaintiff must allege: (1) that a right secured by the Constitution of the United States was violated, and (2) that the violation was committed by a federal actor. Id.; Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988).

To the extent the Complaint names the United States Bureau of Immigration and Customs Enforcement as a Defendant (see Compl. at 21-22), it fails to state a claim against this Defendant. Bivens provides that "federal courts have the inherent authority to award damages against federal officials to compensate plaintiffs for violations of their constitutional rights." Western Center for Journalism v. Cederquist, 235 F.3d 1153, 1156 (9th Cir. 2000). However, a Bivens action may only be brought against the responsible federal official in his or her

1 individual capacity. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1988). Bivens does
2 not authorize a suit against the government or its agencies for monetary relief. FDIC v. Meyer,
3 510 U.S. 471, 486 (1994); Thomas-Lazear v. FBI, 851 F.2d 1202, 1207 (9th Cir. 1988); Daly-
4 Murphy, 837 F.2d at 355.

5 Nor does Bivens provide a remedy for alleged wrongs committed by a private entity
6 alleged to have denied Plaintiff's constitutional rights under color of federal law. Correctional
7 Services Corp. v. Malesko, 534 U.S. 61, 69 (2001) ("'[T]he purpose of *Bivens* is to deter *the*
8 *officer,*' not the agency.") (quoting Meyer, 510 U.S. at 485); Malesko, 534 U.S. at 66 n.2
9 (holding that Meyer "forecloses the extension of *Bivens* to private entities."). Additionally, a
10 Bivens action can only be brought against federal agents for unconstitutional acts alleged to have
11 been taken in their *individual* capacities. Meyer, 510 U.S. at 486 (holding that a Bivens action
12 will not lie against the United States, agencies of the United States, or federal agents in their
13 official capacity); Nurse v. United States, 226 F.3d 996, 1004 (9th Cir. 2000) (holding that
14 plaintiff suing under Bivens "cannot state a claim against the federal officers in their official
15 capacities unless the United States waives its sovereign immunity."); Vacarro v. Dobre, 81 F.3d
16 854, 857 (9th Cir. 1996) ("[A] *Bivens* action can be maintained against a defendant in his or her
17 individual capacity only, and not in his or her official capacity.") (citing Daly-Murphy, 837 F.2d
18 at 355).

19 Thus, to the extent Plaintiff seeks damages under Bivens against the United States Bureau
20 of Immigration and Customs Enforcement, as opposed to the individual detention officers
21 staffing the SDCF, such a claim must be dismissed because that defendant is an agency of the
22 federal government. Likewise, to the extent Plaintiff intended to bring a Bivens cause of action
23 against the Correctional Corporation of America (as opposed to its individual officers) or against
24 the individual officers in their official capacities, such claims are not cognizable in this Court.
25 Accordingly, Plaintiff's claims pursuant to Bivens against the United States Bureau of
26 Immigration and Customs Enforcement, against the Correctional Corporation of America, and
27 against the individual Defendant detention officers in their official capacities are **DISMISSED**
28 sua sponte pursuant to 28 U.S.C. § 1915(e)(2).

1 The Court will now consider the only remaining claims in this action, Plaintiff's Bivens
2 claims against the individual detention officers acting in their individual capacities. These
3 Defendants include Barbara Wagner, the Warden of SDCF, and Detention Officers Harper,
4 Alvarez, Winters, Payne and Teran, all of whom are identified as employees of CCA and are
5 alleged to have been acting under color of federal law by virtue of the contractual relationship
6 between the United States Bureau of Immigration and Customs Enforcement and the CCA.[1]

7 **D. First Amendment**

8 Plaintiff claims that the Defendants violated his First Amendment right to petition the
9 government for redress of his grievances, to free speech, and of access to the courts. (Compl.
10 at 21-22.) He alleges that Defendant Alvarez intentionally opened his legal mail outside his
11 presence, that he was hampered in his ability to file grievances regarding the conditions of his
12 confinement, and was punished for filing grievances. (Id. at 6, 9, 15-17, 19, 21.)

13 Inmates "have a constitutional right to petition the government for redress of their
14 grievances, which includes a reasonable right of access to the courts." O'Keefe v. Van Boening,
15 82 F.3d 322, 325 (9th Cir. 1996); Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995). Prison
16 officials who deliberately interfere with the transmission of an inmate's legal papers, or deny
17 him access to a legitimate means to petition for redress for the purpose of thwarting his litigation
18 may violate the inmate's constitutionally protected right to access to the court. Lewis v. Casey,
19 518 U.S. 343, 351-55 (1996); Vandelft v. Moses, 31 F.3d 794, 796 (9th Cir. 1994). However,
20 in order to state a First Amendment claim, Plaintiff must allege a specific actual injury involving

21 ---

22 [1] The Court in Malesko, in holding that private corporations such as CCA cannot be sued under Bivens, explicitly reserved ruling on the issue whether private individuals hired to perform functions
23 traditionally performed by federal officers, such as Plaintiff alleges the CCA officers were performing here, could be sued under Bivens. Malesko, 534 U.S. at 65. The Court does not at this time reach the
24 open issue regarding whether Plaintiff is allowed to bring a Bivens action against individual CCA employees, and nothing in this Order is intended to reflect the Court's position on that issue one way
25 or the other. Likewise, the Supreme Court has cautioned against extending Bivens remedies into new contexts. See id. at 67-68 (recognizing that Bivens has been extended from the Fourth Amendment
26 context only to include claims against federal officers under the Fifth and Eighth Amendments); Schweiker v. Chilicky, 487 U.S. 412, 422 (1988); Meyer, 510 U.S. at 484. This Order takes no position
27 on whether the Court will extend Bivens to any claim not already recognized by the Supreme Court as encompassed by Bivens. That determination, along with the determination whether Bivens applies to
28 individual CCA employees, will take place, if at all, at a later stage of these proceedings.

1 a nonfrivolous legal claim, Lewis, 518 U.S. at 351-55, and must allege facts showing that he
2 "could not present a claim to the courts because of the [Defendants'] failure to fulfill [their]
3 constitutional obligations." Allen v. Sakai, 48 F.3d 1082, 1091 (9th Cir. 1994). The First
4 Amendment right of access to courts is only guaranteed for certain types of claims: direct and
5 collateral attacks upon a conviction or sentence, and civil rights actions challenging the
6 conditions of confinement. Lewis, 518 U.S. at 354. Even among these types of claims, actual
7 injury will exist only if "a nonfrivolous legal claim had been frustrated or was being impeded."
8 Id. at 353 & n.3. Thus, to state a claim for interference with the right of access to the courts,
9 Plaintiff must plead facts sufficient to show that the Defendants have actually frustrated or
10 impeded a nonfrivolous attack on either his continued confinement or the conditions of his
11 confinement. Id. at 352-53.

12 With respect to opening his legal mail outside his presence on a single occasion, Plaintiff
13 has not alleged facts sufficient to show that he has been precluded from pursuing a non-frivolous
14 direct or collateral attack upon either his criminal conviction or sentence or the conditions of his
15 current confinement. See Lewis, 518 U.S. at 355; see also Christopher v. Harbury, 536 U.S.
16 403, 415 (2002) (the non-frivolous nature of the "underlying cause of action, whether anticipated
17 or lost, is an element that must be described in the complaint.") There are no allegations
18 whatsoever that the opening of his mail outside his presence caused any injury at all, much less
19 the type of "actual injury" required to state a claim under Lewis. See Stevenson v. Koskey, 877
20 F.2d 1435, 1440-41 (9th Cir. 1989) (recognizing that due process clause protections are not
21 implicated in every instance of lack of due care by government officials).

22 With respect to his claims that his access to the grievance procedures was interfered with,
23 in addition to failing to allege an actual injury as required by Lewis, Plaintiff simply has no
24 protected interest in a grievance procedure. See Mann v. Adams, 855 F.2d 639, 640 (9th Cir.
25 1988) (finding that the federal due process clause creates "no legitimate claim of entitlement to
26 a [prison] grievance procedure"). However, with respect to Plaintiff's claims that he was
27 retaliated against or punished for utilizing the grievance procedures, such claims are analyzed
28 below in connection to his due process and retaliation claims.

Accordingly, all Bivens claims set forth in the Complaint alleging a violation of the First Amendment are **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2); Lopez, 203 F.3d at 1126-27. Plaintiff is granted leave to file an amended complaint in accordance with the requirements set forth at the end of this Order in an attempt to cure the identified pleading defects. Plaintiff also has the option of informing the Court that he does not wish to file an amended complaint and thereby abandon the opportunity to attempt to cure the defects of pleading with respect to his First Amendment claims.

E. Fifth Amendment

The Due Process Clause of the Fifth Amendment protects persons from the deprivation of their life, liberty and property without due process of law, and has both procedural and substantive components. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). The procedural prong provides "a guarantee of fair procedure in connection with the deprivation of life, liberty or property." Id. The substantive prong "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" Id. (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). The Court will first consider Plaintiff's procedural due process claims regarding the disciplinary proceedings, and then turn to Plaintiff's substantive due process claims regarding the conditions of confinement.

a) procedural due process

Plaintiff alleges he was found guilty at a disciplinary hearing for interfering with the count and was sentenced to 36 days in segregated housing. (Compl. at 13-14.) He alleges that Defendant Winters denied his request to have witnesses appear on his behalf, that Winters sentenced him harshly in order to please her boss, Defendant Harper, and that both Harper and Winters were motivated by a desire to punish Plaintiff for the grievances he had written. (Id.) Plaintiff alleges that Defendant Alvarez's presence at the hearing constituted a conflict of interest because Alvarez was a complaining witness, and that Defendant Teran submitted an affidavit which contained false statements motivated by the fact that Teran had been involved in a verbal altercation with Plaintiff earlier in the day. (Id. at 13.)

Plaintiff also alleges that he had interfered with the count on numerous prior occasions by engaging in similar behavior, but that there had never before been any consequences to his actions or even any warnings, and that it was only after he had begun to file grievances that he was charged with a disciplinary infraction and sent to segregation. (Id. at 16.) Plaintiff alleges the Defendants' actions were racially motivated because he is Black, and a Caucasian inmate (with whom Plaintiff was similarly situated) had interfered with the same count in an even more disruptive manner than Plaintiff, but received a less severe punishment. (Compl at 11.)

A pretrial detainee who is placed in disciplinary segregation as punishment has a right to a hearing. See Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (holding that "pretrial detainees may be subjected to disciplinary segregation only with a due process hearing to determine whether they have in fact violated any rule."); see also Sandin v. Conner, 515 U.S. 472, 484 (1995) (observing that a pre-trial detainee, unlike a convicted prisoner, may have a liberty interest in not being placed in disciplinary segregation.). Plaintiff's allegations, however, fail to state a claim for denial of procedural due process regarding the disciplinary proceedings because they do not satisfy the standards set forth in Wolff v. McDonnell, 418 U.S. 539, 563-70 (1974).

Under Wolff, detainees facing a disciplinary hearing are entitled to: (1) written notice of the charges at least 24 hours in advance of the hearing; (2) a written statement indicating upon what evidence the fact finders relied and the reasons for the disciplinary action; (3) the opportunity to call witnesses and present documentary evidence when doing so will not be unduly hazardous to institutional safety or correctional goals; and (4) an impartial fact finder. Wolff, 418 U.S. at 564-71. Although Plaintiff sets forth conclusory allegations that he was not allowed to call witnesses, that the hearing officers were biased, and that he did not receive notice of the charges against him, he does not support this claim with sufficiently specific factual allegations. In order to satisfy Wolff, Plaintiff must allege not only that he requested to call witnesses and was not allowed to do so, but must also allege facts showing that the witnesses he requested were necessary to provide him with due process and that their presence would not be hazardous to institutional security. The same is true with respect to the allegations of false

and fabricated evidence. Plaintiff must allege with sufficient specificity not only what statements were fabricated, but how the false or fabricated evidence affected the fairness of his hearing, and why he was unable to challenge the evidence at the hearing or in any subsequent appeal. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient" to state a claim upon which relief may be granted). With respect to the allegation that Plaintiff did not receive an investigative summary, i.e., a written statement indicating upon what evidence the fact finders relied, he must specifically allege that he did not receive such a statement. The allegations regarding retaliation and racially-motivated behavior are discussed immediately below.

b) substantive due process

Plaintiff alleges various Eighth Amendment claims, including that (a) the disciplinary proceedings were a sham dictated by motives of revenge and racial intolerance and were instituted in retaliation for his use of the grievance procedures, (b) he was subjected to crowded and unsanitary conditions during his confinement in the general population, causing potential safety hazards and requiring him to sleep on the floor next to a toilet, and (c) he was subjected to constant illumination, cold temperatures without sufficient blankets or clothing, and an overflowing toilet, while confined in the segregated housing unit. (Compl. at 22.) However, because Plaintiff is a civil detainee and not a prisoner serving a criminal sentence, the Eighth Amendment does not apply to him. Bell v Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [and] the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."); Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002) ("Because [petitioner] had not been convicted of a crime, but had only been arrested, his rights derive from the due process clause rather than the Eighth Amendment's protection against cruel and unusual punishment.").

Rather, Plaintiff's conditions of confinement claims must be analyzed under "the more protective" substantive due process standard. Jones v. Blanas, 393 F.3d 918, 931-33 (9th Cir.

2004); see also Wolfish, 441 U.S. at 538-39 ("Absent a showing of an express intent to punish on the part of detention facility officials, . . . if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"); Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) ("The concept of 'substantive due process,' semantically awkward as it may be, forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'") (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)). However, "the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: 'persons in custody ha(ve) the established right not to have officials remain deliberately indifferent'" to their needs. Gibson, 290 F.3d at 1187 (quoting Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996)); Lolli v. County of Orange, 351 F.3d 410, 418-19 (9th Cir. 2003). The Court will therefore look to Eighth Amendment standards to determine the minimum level of protection afforded Plaintiff.

The Eighth Amendment prohibits any punishment which violates civilized standards of decency or involves the "unnecessary and wanton infliction of pain." Ingraham v. Wright, 430 U.S. 651, 670 (1977) (citing Estelle v. Gamble, 429 U.S. 97, 102-03 (1976)). An Eighth Amendment claim challenging conditions of confinement contains both an objective and a subjective component. See Wilson v. Seiter, 501 U.S. 294, 298 (1991); Osolinski v. Lane, 92 F.3d 934, 937 (9th Cir. 1996). The objective component requires the plaintiff to demonstrate that he has been subjected to specific deprivations that are so serious that they deny him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Hudson v. McMillian, 503 U.S. 1, 8-9 (1992) ("'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.'") (quoting Rhodes, 452 U.S. at 347).

The subjective component requires Plaintiff to demonstrate that the prison officials acted wantonly, with deliberate indifference to Plaintiff's health and safety. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson, 501 U.S. at 298-99. Deliberate indifference is the reckless disregard of a substantial risk of serious harm. See Farmer, 511 U.S. at 836. Mere negligence

is insufficient to establish deliberate indifference since "Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" Id. at 835 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

Plaintiff's allegations regarding verbal harassment and attempts to humiliate him fail to state a Bivens claim because these allegations fail to rise to the level of "punishment" so as to violate substantive due process. See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (harassment does not constitute cruel and unusual punishment); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (harassment in the form of vulgar language directed at an inmate is not cognizable under § 1983); McDowell v. Jones, 990 F.2d 433, 434 (8th Cir. 1993) (holding that verbal threats and name calling are not actionable under § 1983); Van Strum, 940 F.2d at 409 ("Actions under § 1983 and those under Bivens are identical save for the replacement of a state actor under § 1983 by a federal actor under Bivens.")

Plaintiff's allegations regarding missing a single meal and being housed with a cellmate who did not speak the same language and had a habit of throwing used toilet paper in the wastebasket rather than flushing it down the toilet, are simply insufficient to show that he was denied a basic human need, and are insufficient to satisfy the objective component of a "cruel and unusual punishment" claim. See Hudson, 503 U.S. at 8-9 ("only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.") (quoting Rhodes, 452 U.S. at 347). Although Plaintiff alleges such incompatibility may lead to violence, allegations of speculative injury without a showing of a real possibility of violence are insufficient to state a claim. Farmer, 511 U.S. at 834-36; Wilson, 501 U.S. at 298-99.

However, Plaintiff's allegations regarding deliberate indifference to his health and safety while housed in segregation survive the screening provisions of 28 U.S.C. § 1915 with respect to Defendants Alvarez and Payne. Plaintiff alleges that on November 27, 2004, he reported that his toilet had overflowed and was told by an unnamed detention officer that he would put in a work order for a plumber, but the toilet was not fixed for almost five days. (Compl. at 17.) On November 29, 2004, Defendant Alvarez attempted to deliver Plaintiff's legal mail, but when

Plaintiff complained that it had been opened outside his presence and would not accept it, Alvarez allegedly replied "write me up I don't give a shit." (Id.) Plaintiff asked Alvarez at that time about the toilet, and Alvarez replied that he already knew about it and Plaintiff would just have to wait until it was fixed since it was not a priority. (Id. at 17-18.) Plaintiff then requested that Alvarez move him to another one of many empty cells in the segregation unit, but Alvarez refused even though he planned to move another inmate to a different cell later that day simply because that inmate "did not like" the cell he occupied. (Id. at 18.)

Plaintiff states that he went on a hunger strike to protest his living conditions, and the next day Defendant Payne came to Plaintiff's cell and told Plaintiff that Payne and Alvarez were betting whether he would eat the next day, and Payne said he had bet that Plaintiff would not eat and was there to let Plaintiff know that Payne had faith in him that he would not eat the next day. (Id.) Plaintiff states that he did not eat anything for the next four days due to the excrement in his cell, which caused him to throw up when he tried to eat. (Id.) He states that on the morning of December 2, 2004, the public health officer came by, and in reaction to the smell coming from his cell, instructed Alvarez to fix the toilet immediately or move Plaintiff to another cell. (Id. at 18-19.) As Plaintiff was packing his belongings that afternoon, a plumber came and fixed the toilet just as Plaintiff was leaving. (Id. at 19.) Plaintiff alleges Alvarez could have had the toilet fixed sooner or could have moved him to another cell but refused to do so in order to maliciously cause Plaintiff suffering and degradation. (Id.)

These allegations are sufficient to pass the screening process with respect to a Fifth Amendment substantive due process claim against Defendants Alvarez and Payne. Plaintiff has sufficiently alleged that these Defendants knew of and deliberately ignored his need to be moved to another cell due to the unsanitary conditions in his cell. As noted above, however, the Court does not at this time take any position on the issue explicitly reserved by the United States Supreme Court in Malesko regarding whether private individuals hired to perform functions traditionally performed by federal officers, such as Plaintiff alleges the CCA officers were performing here, can be sued under Bivens. See Malesko, 534 U.S. at 65. Such a determination will be made, if at all, at a later stage of these proceedings.

With respect to Plaintiff's claim that "the warden and her supervisors" are also liable for the conditions of his confinement in the segregated housing unit because they did not properly supervise the other Defendants, or did not respond to his grievances regarding their behavior (see Compl. at 20), he has failed to state a claim. Bivens, like section 1983, does not authorize suits predicated on a respondeat superior theory. See Terrell v. Brewer, 935 F.2d 1015 (9th Cir. 1991). Instead, "[t]he inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (citing Rizzo v. Goode, 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual Defendant which have a direct causal connection to the constitutional violation at issue. See Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may only be held liable for the alleged unconstitutional violations of her subordinates if Plaintiff alleges specific facts which show: (1) how or to what extent she personally participated in or directed the Defendants' actions, and (2) that the Defendant failed to prevent a violation of Plaintiff's Constitutional rights. Taylor, 880 F.2d at 1045.

Although Plaintiff alleges he informed the Warden of the conditions of his confinement in segregated housing, he alleges that he did so after he had been transferred from SDCF to the El Centro Facility. (Compl. at 20 & Ex. C.) Plaintiff also alleges he submitted grievances while in segregation and is unsure if they were processed, but does not identify as Defendants the individuals to whom the grievances were directed and does not set forth specific factual allegations regarding the content of the grievances. For example, if Plaintiff alleges that he made the Warden aware of the conditions in segregation described above before he was transferred, he must set forth specific factual allegations regarding how he did so.

With respect to Plaintiff's claim of overcrowding in the general population, i.e., that three detainees were housed in a cell 16 to 22 hours per day not large enough for all three people to stand simultaneously, and that he was required to sleep on the floor with his head next to a toilet causing him to be urinated upon and awakened by flushing of the toilet, such allegations survive

1 the screening process with respect to the objective prong of a substantive due process claim.
2 Wolfish, 441 U.S. at 542-43. With respect to the subjective prong, however, unlike the
3 allegations that Defendant Alvarez was aware of the conditions in segregation and had the
4 authority and ability to move Plaintiff to another cell but deliberately ignored Plaintiff's request,
5 Plaintiff does not identify individuals to whom he raised his concerns regarding overcrowding
6 in the general population who had the authority to relieve the overcrowding but refused to do
7 so. Rather, Plaintiff alleges that the individuals detention officers he approached about the
8 overcrowding problem stated that it was a CCA policy they had no authority to change. (Compl.
9 at 8.) Plaintiff also alleges that CCA is responsible for the policy, but as discussed above he is
10 unable to maintain a Bivens action against the CCA.

11 Plaintiff attaches to his Complaint a copy of a grievance form dated November 18, 2004,
12 which is addressed to the Unit Manager, all Unit Officers and the Chief of Security, in which
13 he complains of the conditions in general population. (Compl. Ex. A.) He also alleges that he
14 complained about the conditions to a detention officer who is not named as a Defendant and who
15 responded rudely that Plaintiff was not in a hotel and should get used to the conditions. (Compl.
16 at 7.) Plaintiff states that an unidentified Unit Manager told him that she would re-train that
17 officer, and told Plaintiff that the overcrowding was due to the policy of the CCA and there was
18 nothing that any of the individual detention officers could do about it. (Id.) If Plaintiff wishes
19 to proceed with a due process claim regarding the conditions of his confinement in the general
20 population, he must identify as Defendants the individuals to whom he complained of those
21 conditions and must allege facts demonstrating that those individuals had the ability to address
22 his concerns but deliberately ignored them.

23 Accordingly, all Bivens claims set forth in the Complaint alleging a violation of the Fifth
24 Amendment are **DISMISSED** without prejudice for failing to state a claim upon which relief
25 may be granted, with the exception of Plaintiff's claim for denial of substantive due process
26 against Defendants Alvarez and Payne. See 28 U.S.C. § 1915(e)(2); Lopez, 203 F.3d at 1126-
27 27. Plaintiff is granted leave to file an amended complaint in accordance with the requirements
28 set forth at the end of this Order in an attempt to cure the pleading defects identified with respect

1 to the dismissed claims. Plaintiff also has the option of informing the Court that he does not
2 wish to file an amended complaint and thereby abandon the opportunity to attempt to cure the
3 defects of pleading with respect to the dismissed Fifth Amendment claims.

4 **F. Eighth Amendment**

5 As set forth above, because Plaintiff is a detainee and not a prisoner, the Eighth
6 Amendment does not apply to him and his claims are required to be analyzed under substantive
7 due process principles of the Due Process Clause of the Fifth Amendment. Wolfish, 441 U.S.
8 at 535 n.16; Jones, 393 F.3d at 931-33; Gibson, 290 F.3d at 1187. Accordingly, Plaintiff's
9 Eighth Amendment claims are **DISMISSED** without prejudice. As set forth above, Plaintiff
10 may proceed with his claims regarding the conditions of confinement in relation to his Fifth
11 Amendment claims.

12 **G. Retaliation**

13 Under a liberal reading of the Complaint, Plaintiff appears to be alleging that the
14 Defendants retaliated against him because they think he complains too much and files too many
15 grievances. A plaintiff suing detention facility officials for retaliation must allege: (1) that he
16 was retaliated against for exercising his constitutional rights, i.e., that his conduct was
17 constitutionally protected and was a "substantial" or "motivating" factor in the defendant's
18 decision to act, Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989); Mt.
19 Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); and (2) that the
20 retaliatory action "does not advance legitimate penological goals, such as preserving institutional
21 order and discipline." Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995); Barnett v. Centoni,
22 31 F.3d 813, 816 (9th Cir. 1994).

23 To the extent Plaintiff alleges he was retaliated against for filing grievances, he has
24 adequately alleged that he engaged in activities protected by the First Amendment. A prisoner's
25 right of meaningful access to the courts, along with his broader right to petition the government
26 for the redress of grievances under the First Amendment, precludes prison authorities from
27 penalizing a prisoner for exercising those rights. Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir.
28 1995).

Plaintiff alleges that he had interfered with the count on numerous occasions by failing to stand up during the count and there were never any consequences or even warnings, and it was only after he had begun filing grievances that he was charged with a disciplinary infraction and sent to segregation. (Compl. at 16.) Plaintiff also alleges that a Caucasian inmate interfered with the same count and was given a lesser punishment than Plaintiff, who is Black. (Id. at 11.) Such allegations provide circumstantial evidence that Defendant Terhan, the person Plaintiff alleges issued the disciplinary charge, acted from a retaliatory motive and that the penological justification was a sham, especially in conjunction with Plaintiff's allegation that Terhan submitted false evidence at the ensuing disciplinary hearing based on a prior altercation with Plaintiff.

However, such allegations are not evidence of retaliatory motive or lack of penological justification on the part of the other persons involved in the disciplinary proceedings because Plaintiff does not allege that the other Defendants were aware of Tehan's alleged retaliatory motive in filing the disciplinary charges. Although Plaintiff alleges that Defendant Harper "was one of the people who had filed complaints about me and ordered my transfer to the segregation unit" (Compl. at 14) he does not identify the nature of the "complaints" referred to or what role Harper had in Plaintiff's placement in the segregated housing unit. Thus, although Plaintiff's claim for retaliation against Defendant Terhan survives the screening process, his retaliation claims against the remaining Defendants are subject to dismissal for failure to state a claim. Plaintiff does not adequately allege that his grievance activities were a "substantial" or "motivating" factor in any other Defendant's decision to act, because he has not alleged that any other Defendant was aware that he had been charged with the disciplinary infraction by Terhan on the basis of his grievance activities, and does not allege that he had any previous altercations with any other Defendant or that he filed grievances against any other Defendant which motivated their actions. Soranno's Gasco, 874 F.2d at 1314; Pratt, 65 F.3d at 806.

Accordingly, Plaintiff's retaliation claims against all Defendants except Defendant Tehran are **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2); Lopez, 203 F.3d at 1126-27. If Plaintiff wishes to proceed

with a retaliation claim against any other Defendant, he must file an amended complaint in which he alleges facts sufficient to demonstrate that his grievance activities were a "substantial" or "motivating" factor in each Defendant's decision to act, and that such actions lacked a legitimate penological justification.

H. Conspiracy/Equal Protection

Plaintiff alleges that several Defendants conspired to sentence him to an unusually long term of segregation for the disciplinary infraction. (Compl. at 14-15.) In order to state a claim for conspiracy, Plaintiff must allege facts demonstrating that the Defendants reached an agreement to deprive him of his civil rights. See Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989). Conclusory allegations of a conspiracy are insufficient to support a claim. Margolis, 140 F.3d at 853; Woodrum, 866 F.2d at 1126. Plaintiff has failed to state a claim for conspiracy because he has failed to allege facts demonstrating that any Defendant reached an agreement with anyone to deprive Plaintiff of his civil rights. Although Plaintiff alleges Defendant Winters sentenced him harshly because she wanted to please her boss, this is not sufficient to allege an agreement between the two Defendants.

Plaintiff also alleges his equal protection rights were violated because the Defendants' actions were racially motivated, as Plaintiff is Black, and disciplinary actions taken against a Caucasian inmate with whom he was similarly situated were less severe. (Compl. at 11.) In order to state a claim for conspiracy to violate his equal protection rights, Plaintiff's allegations must be sufficient to show: (1) a conspiracy to deprive him, as a member of a protected class, equal protection of the laws, (2) an act by one of the conspirators in furtherance of the conspiracy, and (3) a personal injury, property damage or deprivation of a right or privilege guaranteed to him as a citizen of the United States. Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980). With respect to the equal protection claim, Plaintiff must allege racial or "perhaps otherwise class-based" discriminatory animus behind the conspirator's actions. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Moreover, Plaintiff's Complaint must contain facts describing the overt acts that Defendants committed in furtherance of the conspiracy. Id. at 102-

03; Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988). Mere allegations that Defendants engaged in a conspiracy is insufficient to state a claim; Plaintiff must allege overt acts taken by the Defendants in furtherance of the conspiracy. Karim-Panahi, 839 F.2d at 626; Sanchez v. City of Santa Ana, 936 F.2d 1027, 1039 (9th Cir. 1990).

Plaintiff's claim for conspiracy to violate his equal protection rights fails for the same reason as his other conspiracy claim, because he has failed to allege the Defendants reached an agreement to violate his rights. To the extent Plaintiff intended to bring a separate claim for violation of his equal protection rights apart from the conspiracy to violate those rights, his claim is properly considered in connection to his Fifth Amendment due process claims above. See United States v. Sahhar, 917 F.2d 1197, 1200 n.3 (9th Cir. 1990) (observing that although the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, the federal government must provide persons with "equal protection of the laws."), citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Accordingly, Plaintiff's conspiracy claims are **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2); Lopez, 203 F.3d at 1126-27. If Plaintiff wishes to proceed with a conspiracy claim, he must allege facts demonstrating that Defendants reached an agreement to deprive Plaintiff of his civil rights.

IV. Leave to Amend

The Court will provide Plaintiff with the opportunity to file an amended complaint in an attempt to cure the defects of his pleading regarding the claims which are dismissed in this Order. However, if Plaintiff chooses to file a First Amended Complaint he is warned that it will be subject to the screening provisions of 28 U.S.C. § 1915(e)(2). The First Amended Complaint must be complete in itself without reference to any previously filed version of the complaint. See S. D. CAL. CIV L R 15.1. Defendants not named and all claims not re-alleged in the amended complaint will be considered waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Moreover, if the First Amended Complaint fails to cure the pleading defects set forth in this Order, any or all of the claims therein which fail to state a claim may be dismissed without further leave to amend. See McHenry v. Renne, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

If Plaintiff does not wish to file a First Amended Complaint but wishes instead to proceed with the original Complaint, which now contains only claims against Defendants Alvarez and Payne for violation of his Fifth Amendment rights and against Defendant Teran for retaliation, Plaintiff may so inform the Court. The Court will then order the United States Marshal to serve a copy of this Order along with the Summons and Complaint upon these Defendants, and Plaintiff will have lost the opportunity to amend his Complaint to include the claims which are dismissed in this Order.

V. Conclusion and Order

Based on the foregoing, **IT IS HEREBY ORDERED** that:

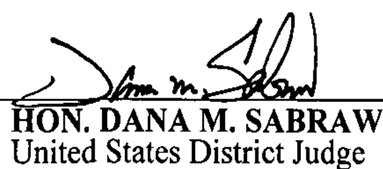
(1) Plaintiff's Motion to Proceed IFP per 28 U.S.C. § 1915(a) is **GRANTED**;

(2) All claims in the Complaint against all Defendants are **DISMISSED** sua sponte without prejudice for failing to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2), with the exception of Plaintiff's Fifth Amendment claim against Defendants Alvarez and Payne, and his claim for retaliation against Defendant Teran; and,

(3) Plaintiff is **GRANTED** forty-five (45) days leave from the date this Order is stamped "Filed" to file a First Amended Complaint which addresses all the deficiencies of pleading set forth above <u>or</u> to inform the Court that he does not wish to amend his Complaint and wishes the Court to order the United States Marshal to serve a copy of the summons and Complaint on Defendants Alvarez, Payne and Teran only. Plaintiff is cautioned that if he chooses to proceed with his original complaint against Defendants Alvarez, Payne and Teran only, he will forfeit the opportunity to amend his Complaint with respect to the claims dismissed in this Order.

IT IS SO ORDERED.

DATED: 8-4-05



HON. DANA M. SABRAW
United States District Judge

CC: PLAINTIFF IN PRO SE
*HON. MAGISTRATE JUDGE PETER C. LEWIS