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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HENRY A. JONES, JR.,

Plaintiff,

v.

DR. C. WU,

Defendant.

Case No. CV 15-5884 DDP (SS)

**MEMORANDUM AND ORDER
DISMISSING AMENDED COMPLAINT
WITH LEAVE TO AMEND**

**I.
INTRODUCTION**

On August 4, 2015, Plaintiff Henry A. Jones Jr. ("Plaintiff"), a California state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 ("Complaint"). (Dkt. No. 1). On November 30, 2015, the Court dismissed the Complaint with leave to amend ("Order of Dismissal"). (Dkt. No. 14). On December 30, 2015, Plaintiff

1 filed the now-operative amended civil rights complaint pursuant
2 to 42 U.S.C. § 1983 ("Amended Complaint").¹ (Dkt. No. 31).

3
4 Congress mandates that the court screen, as soon as
5 practicable, "a complaint in a civil action in which a prisoner
6 seeks redress from a governmental entity or officer or employee
7 of a governmental entity." 28 U.S.C. § 1915A(a). The court may
8 dismiss such a complaint, or any portion of it, before service of
9 process if the court concludes that the complaint (1) is
10 frivolous or malicious, (2) fails to state a claim upon which
11 relief can be granted, or (3) seeks monetary relief from a
12 defendant who is immune from such relief. 28 U.S.C. § 1915A(b).
13 For the reasons discussed below, the Amended Complaint is
14 DISMISSED with leave to amend.²

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17
18 ¹ Because of a docketing error by the Clerk's Office, the Amended
19 Complaint was docketed several months after it was filed.

20 ² Magistrate Judges may dismiss a complaint with leave to amend
21 without approval of the District Judge. See McKeever v. Block,
932 F.2d 795, 798 (9th Cir. 1991).

22 The Court also notes that, on January 18, 2017, Plaintiff filed a
23 Notice of Appeal from an order denying a motion for a "writ of
24 mandate" that sought to expedite a decision in this case. (Dkt.
25 Nos. 44-46). The Ninth Circuit has not issued a ruling in
26 Plaintiff's appeal. However, because the order denying
27 Plaintiff's motion was not a final appealable order, the district
28 court retains jurisdiction to issue the instant Order. See
Estate of Conners v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993)
("Th[e] transfer of jurisdiction from the district court to the
court of appeals is not effected . . . if a litigant files a
notice of appeal from an unappealable order.").

1 II.

2 ALLEGATIONS OF THE AMENDED COMPLAINT

3
4 Plaintiff names Dr. Chengocong Wu, a physician at California
5 State Prison, Los Angeles County, as the sole Defendant in this
6 action. (Amended Complaint at 1-3, 6-7, 9-10). Plaintiff names
7 Dr. Wu as a Defendant in both his official and individual
8 capacities. (Id. at 9). Plaintiff claims that Dr. Wu was
9 deliberately indifferent to Plaintiff's serious medical needs in
10 violation of the Eighth Amendment. (Id. at 15).

11
12 Plaintiff alleges that, in January 2007, he had a
13 defibrillator implanted because he "needed this device to stay
14 alive." (Id. at 10). However, Plaintiff subsequently came to
15 believe that his defibrillator was subject to a recall and he
16 filed grievances asking to have it removed. (Id.). Plaintiff
17 later discussed his concerns with Dr. Wu, who "informed
18 [P]laintiff he no longer need[ed] the device any way." (Id.
19 (formatting altered)). Plaintiff claims that Dr. Wu subsequently
20 removed the defibrillator "without fully knowing that it had been
21 recalled or no longer the need for the device." (Id. at 12, 15).
22 Plaintiff also claims that Dr. Pavel Petrik informed Plaintiff
23 that the leads on the defibrillator "would have to come out," but
24 Dr. Wu ordered that they not be removed. (Id. at 15).

25
26 Plaintiff claims that his family has a history of heart
27 problems and that for the past six months he has "display[ed]
28 signs of heart complication and elevated blood pressure"

1 indicating that he needs a defibrillator. (Id.). Plaintiff
2 alleges that, "if CDCR does not re-install him with another
3 device, he will die." (Id. at 10 (spelling and formatting
4 altered)).

5
6 Plaintiff also appears to allege that Dr. Wu temporarily
7 ordered that Plaintiff's heart medication be crushed "in
8 retaliation" for unspecified actions, even though he knew that
9 Plaintiff would not take the medications if they were crushed.
10 (Id. at 12-13, 16, 55). Finally, Plaintiff alleges that he
11 requested to see a heart specialist on October 27, 2015, but
12 Plaintiff had not seen a specialist by December 12, 2015, the
13 date when the Amended Complaint was prepared. (See id. at 13,
14 16).

15
16 Plaintiff seeks an injunction requiring prison staff to
17 provide him with a new defibrillator, as well as compensatory and
18 punitive damages. (Id. at 16).

19
20 **III.**

21 **DISCUSSION**

22
23 The Court must dismiss the Amended Complaint due to defects
24 in pleading. A pro se litigant in a civil rights case, however,
25 must be given leave to amend his or her complaint unless "it is
26 absolutely clear that the deficiencies of the complaint cannot be
27 cured by amendment." See Akhtar v. Mesa, 698 F.3d 1202, 1212
28 (9th Cir. 2012) (citation and internal quotation marks omitted).

1 Accordingly, the Amended Complaint is dismissed with leave to
2 amend.

3
4 **A. Plaintiff Fails To State A Claim Under 42 U.S.C. § 1983 For**
5 **Deliberate Indifference To Serious Medical Needs**

6
7 Plaintiff alleges that Dr. Wu was deliberately indifferent
8 to his serious medical needs in violation of the Eighth Amendment
9 by removing his defibrillator "without fully knowing that it had
10 been recalled or no longer the need for the device" and by
11 crushing his medication. (Amended Complaint at 12-13, 15-16).
12 However, Plaintiff's deliberate indifference allegations are
13 defective.

14
15 To maintain an Eighth Amendment claim based on a prisoner's
16 medical treatment, the prisoner must demonstrate that the
17 defendant was "deliberately indifferent" to his "serious medical
18 needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). To
19 establish a "serious medical need," the prisoner must demonstrate
20 that "'failure to treat a prisoner's condition could result in
21 further significant injury or the 'unnecessary and wanton
22 infliction of pain.'" Id. at 1096 (citation omitted).

23
24 To establish "deliberate indifference," the prisoner must
25 demonstrate "(a) a purposeful act or failure to respond to a
26 prisoner's pain or possible medical need and (b) harm caused by
27 the indifference." Id. Deliberate indifference "may appear when
28 prison officials deny, delay or intentionally interfere with

1 medical treatment, or it may be shown by the way in which prison
2 physicians provide medical care.” Id. (citations omitted). The
3 defendant must have been subjectively aware of a serious risk of
4 harm and must have consciously disregarded that risk. See Farmer
5 v. Brennan, 511 U.S. 825, 839-40 (1994).

6
7 Mere malpractice or negligence in the provision of medical
8 care does not establish a constitutional violation. Simmons v.
9 Navajo Cnty. Ariz., 609 F.3d 1011, 1019 (9th Cir. 2010).
10 Additionally, a mere difference of opinion in the form or method
11 of treatment does not amount to a deliberate indifference of
12 plaintiff’s serious medical needs. Toguchi v. Chung, 391 F.3d
13 1051, 1058 (9th Cir. 2004).

14
15 The Amended Complaint does not plausibly allege “deliberate
16 indifference,” i.e., a purposeful act or failure to respond to an
17 objectively serious medical need. Particularly, it does not
18 plausibly allege that Dr. Wu was subjectively aware of a risk of
19 harm to Plaintiff and consciously disregarded that risk. On the
20 contrary, Plaintiff’s allegations appear to establish that Dr. Wu
21 responded to Plaintiff’s concerns about his defibrillator,
22 determined that a defibrillator was no longer necessary, and
23 removed the defibrillator. (See Amended Complaint at 10).
24 Plaintiff alleges that Dr. Wu acted “without fully knowing” the
25 risks, which at most constitutes medical negligence and falls
26 short of the “deliberate indifference” standard. See Simmons,
27 609 F.3d at 1019; see also Wilhelm v. Rotman, 680 F.3d 1113, 1123
28 (9th Cir. 2012) (a “negligent misdiagnosis” does not state a

1 claim for deliberate indifference). Plaintiff also appears to
2 allege a "difference of opinion in the form or method of
3 treatment," either between Plaintiff and Dr. Wu or between Dr.
4 Petrik and Dr. Wu. These differences of opinion do not amount to
5 deliberate indifference. Toguchi, 391 F.3d at 1058; see also
6 Wilhelm, 680 F.3d at 1123 (a "disagreement" between a defendant
7 physician and another physician does not state a claim for
8 deliberate indifference).

9
10 In sum, the Amended Complaint acknowledges that Dr. Wu took
11 some affirmative steps to investigate and remedy Plaintiff's
12 complaints and does not plausibly allege that Dr. Wu was
13 deliberately indifferent to Plaintiff's serious medical needs.
14 Accordingly, Plaintiff's deliberate indifference claims are
15 dismissed with leave to amend.

16
17 **B. The Amended Complaint Violates Rule 8**

18
19 The Amended Complaint also does not comply with the
20 standards of Federal Rule of Civil Procedure 8. See Fed. R. Civ.
21 P. 8. Rule 8(a)(2) "'requires only a short and plain statement
22 of the claim showing that the pleader is entitled to relief,' in
23 order to 'give the defendant fair notice of what the . . . claim
24 is and the grounds upon which it rests.'" Bell Atl. Corp. v.
25 Twombly, 550 U.S. 544, 555 (2007). "Each allegation must be
26 simple, concise, and direct." Fed. R. Civ. P. 8(d)(1); see also
27 Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013) (pleading may
28 violate Rule 8 by saying "too little" or "too much").

1 The Amended Complaint does not give Dr. Wu fair notice of
2 what Plaintiff's claims are and the grounds upon which they rest.
3 The Amended Complaint contains potentially relevant and
4 irrelevant disjointed factual assertions, often interspersed with
5 legal argument, rendering Plaintiff's claims confusing. In
6 addition, because Plaintiff is not required to provide evidence
7 at this stage of the litigation, the exhibits attached to the
8 Amended Complaint are unnecessary. It is also unclear whether
9 Plaintiff intends to assert a claim against Dr. Wu for crushing
10 his medication in "retaliation," and Plaintiff does not discuss
11 what actions Dr. Wu was retaliating against. There are also no
12 allegations associating Dr. Wu, the sole Defendant, with
13 Plaintiff's alleged inability to see a heart specialist between
14 October and December 2015, and it is unclear whether Plaintiff
15 intends to assert a claim on this basis.

16
17 Accordingly, the Amended Complaint fails to provide Dr. Wu
18 with fair notice of the claims against him in a clear and concise
19 statement. See Twombly, 550 U.S. at 555. As such, the Amended
20 Complaint is dismissed with leave to amend.

21
22 **C. Any Claims for Money Damages Against Dr. Wu In His Official**
23 **Capacity Are Defective**

24
25 Plaintiff sues Dr. Wu in his official and individual
26 capacities and requests both money damages and injunctive relief.
27 (Amended Complaint at 9, 16). Although it is unclear exactly
28 what relief Plaintiff will seek against Dr. Wu in each capacity,

1 Plaintiff is advised that the Eleventh Amendment bars any claims
2 for money damages against Dr. Wu in his official capacity.

3
4 Pursuant to the Eleventh Amendment, a state and its official
5 arms are immune from suit under section 1983. See Howlett v.
6 Rose, 496 U.S. 356, 365 (1990); Brown v. Cal. Dept. of
7 Corrections, 554 F.3d 747, 752 (9th Cir. 2009) ("California has
8 not waived its Eleventh Amendment immunity with respect to claims
9 brought under § 1983 in federal court"). "A suit against a state
10 official in his or her official capacity . . . is no different
11 from a suit against the State itself." Flint v. Dennison, 488
12 F.3d 816, 824-25 (9th Cir. 2007) (citation omitted).³ Therefore,
13 state officials sued for damages in their official capacity are
14 generally entitled to immunity. Id. at 825.

15
16 When state officials are sued in their official capacity for
17 prospective injunctive relief under section 1983, they are not
18 immune from suit. Id. Therefore, Plaintiff's claims for
19 injunctive relief may be maintained against Dr. Wu in his
20 official capacity. However, any official capacity claims for
21 money damages must be dismissed.

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25 ³ Because official capacity claims are "in all respects other
26 than name" suits against the government entity, Plaintiff's
27 claims here against Defendants in their official capacity are
28 claims against the California Department of Corrections and
Rehabilitation, i.e., the California state government. Kentucky
v. Graham, 473 U.S. 159, 166 (1985).

1 IV.

2 CONCLUSION

3
4 For the reasons stated above, the Amended Complaint is
5 dismissed with leave to amend. If Plaintiff still wishes to
6 pursue this action, he is granted **thirty (30) days** from the date
7 of this memorandum and Order within which to file a Second
8 Amended Complaint. In any amended complaint, Plaintiff shall
9 cure the defects described above.

10
11 **Furthermore, Plaintiff shall omit any claims, allegations or**
12 **parties that are not reasonably related to the claims asserted in**
13 **the Amended Complaint but shall instead attempt to cure the**
14 **deficiencies addressed in this Order.** The Second Amended
15 Complaint, if any, shall be complete in itself and shall bear
16 both the designation "Second Amended Complaint" and the case
17 number assigned to this action. It shall not refer in any manner
18 to any prior complaint.

19
20 In any amended complaint, Plaintiff should confine his
21 allegations to the operative facts supporting each of his claims.
22 Plaintiff is advised that pursuant to Federal Rule of Civil
23 Procedure 8(a), all that is required is a "short and plain
24 statement of the claim showing that the pleader is entitled to
25 relief." **Plaintiff is strongly encouraged to utilize the**
26 **standard civil rights complaint form when filing any amended**
27 **complaint, a copy of which is attached.** In any amended
28 complaint, Plaintiff should identify the nature of each separate

1 legal claim and make clear what specific factual allegations
2 support his claims. Plaintiff is strongly encouraged to keep his
3 statements concise and to omit irrelevant details. It is not
4 necessary for Plaintiff to cite case law or include legal
5 argument.

6
7 Plaintiff is explicitly cautioned that failure to timely
8 file a Second Amended Complaint, or failure to correct the
9 deficiencies described above, will result in a recommendation
10 that this action be dismissed with prejudice for failure to
11 prosecute and obey Court orders pursuant to Federal Rule of Civil
12 Procedure 41(b). Plaintiff is further advised that if he no
13 longer wishes to pursue this action he may voluntarily dismiss it
14 by filing a Notice of Dismissal in accordance with Federal Rule
15 of Civil Procedure 41(a)(1). A form Notice of Dismissal is
16 attached for Plaintiff's convenience. Finally, in the event the
17 Court concludes that Plaintiff's action is frivolous, malicious,
18 or fails to state a claim upon which relief may be granted, this
19 action may constitute a "strike" and bar Plaintiff from future
20 actions.

21
22 DATED: February 3, 2017

23
24 /s/
25 SUZANNE H. SEGAL
26 UNITED STATES MAGISTRATE JUDGE

27 THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW
28 OR ANY OTHER LEGAL DATABASE.