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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

Fernando Xavier Maya,)	No. CV 1-08-1230-JMR
Plaintiff,)	ORDER
vs.)	
Dexter Weed, et al.,)	
Defendants.)	

Plaintiff Fernando Xavier Maya, who is confined in the California Institution for Men in Chino, California, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. # 1). Plaintiff initially filed this case in the United States District Court for the Central District of California; the case was transferred to this District (Doc. # 5). This case was reassigned to the undersigned judge on November 24, 2008 (Doc. # 12). The Court will dismiss the Complaint with leave to amend.

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the

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1 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
2 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
3 (*en banc*).

4 The Court should not, however, advise the litigant how to cure the defects. This type
5 of advice “would undermine district judges’ role as impartial decisionmakers.” Pliler v.
6 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide
7 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint
8 will be dismissed for failure to state a claim, with leave to amend because the Complaint may
9 possibly be saved by amendment.

10 **II. Complaint**

11 Plaintiff sues Avenal State Prison employees Dr. N. Dexter Weed, MTA K.
12 Rodriguez, Correctional Health Services Administrator C. Etchebehere, and RW J. Barber.
13 Plaintiff claims that Defendants “showed a great deal of lack of consideration” toward his
14 need for pain medication. Plaintiff alleges that the doctors and nurses did not feel he required
15 more pain medication than “basic stabilizing” medicine. Plaintiff contends he had to deal
16 with his pain during the cold winter months and medical staff was slow in resolving his
17 problem. With respect to each Defendant, Plaintiff claims that: (1) Weed took an “extremely
18 lengthy” time to resolve his grievance; (2) Rodriguez refused to give Plaintiff additional pain
19 medication, despite the fact that he had taken medication before; (3) Etchebehere took more
20 than three months to review Plaintiff’s grievances; and (4) Barber did not resolve Plaintiff’s
21 grievance.

22 **III. Failure to State a Claim**

23 **A. Deliberate Indifference**

24 Not every claim by a prisoner that he has received inadequate medical treatment states
25 a violation of the Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show
26 that the defendants acted with “deliberate indifference to serious medical needs.” Jett v.
27 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104
28 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating that failure

1 to treat the condition could result in further significant injury or the unnecessary and wanton
2 infliction of pain and (2) the defendant's response was deliberately indifferent. Jett, 439 F.3d
3 at 1096 (quotations omitted).

4 To act with deliberate indifference, a prison official must both know of and disregard
5 an excessive risk to inmate health; the official must both be aware of facts from which the
6 inference could be drawn that a substantial risk of serious harm exists and he must also draw
7 the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference in the
8 medical context may be shown by a purposeful act or failure to respond to a prisoner's pain
9 or possible medical need and harm caused by the indifference. Jett, 439 F.3d at 1096.
10 Deliberate indifference may also be shown when a prison official intentionally denies,
11 delays, or interferes with medical treatment or by the way prison doctors respond to the
12 prisoner's medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

13 Deliberate indifference is a higher standard than negligence or lack of ordinary due
14 care for the prisoner's safety. Farmer, 511 U.S. at 835. "Neither negligence nor gross
15 negligence will constitute deliberate indifference." Clement v. California Dep't of
16 Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter
17 Labs., 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or
18 "medical malpractice" do not support a claim under § 1983). "A difference of opinion does
19 not amount to deliberate indifference to [a plaintiff's] serious medical needs." Sanchez v.
20 Vild, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is
21 insufficient to state a claim against prison officials for deliberate indifference. See Shapley
22 v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference
23 must be substantial. The action must rise to a level of "unnecessary and wanton infliction
24 of pain." Estelle, 429 U.S. at 105-06.

25 Plaintiff alleges Defendants did not provide sufficient pain medication. But this vague
26 allegation is insufficient to state a claim for deliberate indifference. Plaintiff does not even
27 articulate beyond a bare conclusion why he requires pain medication. Plaintiff alleges that
28 Rodriguez "stood her ground" in stating that Plaintiff did not require additional pain

1 medication. But, as stated, “[a] difference of opinion does not amount to deliberate
2 indifference[.]” Sanchez, 891 F.2d at 242. Plaintiff, therefore, has failed to a claim against
3 Defendants. The Court will dismiss them, without prejudice.

4 **B. Failure to Timely Respond to Grievances**

5 Plaintiff also alleges that Defendants violated his rights by failing to respond to his
6 grievances or other administrative appeals in a timely manner. An inmate may state a
7 constitutional violation where, for example, he alleges that a grievance was denied in
8 retaliation for exercising a constitutionally-protected right, see Bradley v. Hall, 64 F.3d 1276,
9 1279 (9th Cir. 1995), or in retaliation for filing a grievance, Valandingham v. Bojorquez, 866
10 F.2d 1135, 1138 (9th Cir. 1989). A plaintiff fails to state a claim, however, based merely
11 upon alleged non-compliance with a grievance process. There is no free-standing
12 constitutional right to a grievance process because inmates do not have a protected liberty
13 interest in jail or prison grievance procedures. Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th
14 Cir. 1996); Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994); Buckley v. Barlow, 997 F.2d 494,
15 493 (8th Cir. 1993) (*per curiam*); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988).
16 Because Plaintiff merely alleges a failure to respond to his grievances or appeals, he fails to
17 state a claim. For this additional reason, Plaintiff’s Complaint will be dismissed with leave
18 to amend.

19 **IV. Leave to Amend**

20 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
21 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
22 amended complaint on the form provided with this Order. If Plaintiff fails to use the form
23 provided with this Order, the Court may strike the amended complaint and dismiss this action
24 without further notice to Plaintiff.

25 Plaintiff must clearly designate on the face of the document that it is the “First
26 Amended Complaint.” The amended complaint must be retyped or rewritten in its entirety
27 on the form provided with this Order and may not incorporate any part of the original
28 Complaint by reference.

1 Plaintiff must comply with the instructions provided with the form. Plaintiff should
2 pay close attention to the instructions provided with the form. If Plaintiff fails to comply
3 with the instructions provided with the form, the Court may strike the amended complaint
4 and dismiss this action without further notice to Plaintiff.

5 Among other requirements contained in the instructions, Plaintiff is advised that the
6 instructions require him to provide information regarding the Court's jurisdiction, provide
7 information about the defendants, and divide his lawsuit into separate counts. In each count,
8 Plaintiff must identify what federal constitutional civil right was violated, identify the issue
9 most closely involved in that count, state which defendants violated that right and what those
10 defendants did to violate that right, explain how Plaintiff was injured by the alleged violation
11 of the constitutional right, and identify whether Plaintiff has exhausted any available
12 administrative remedies. Plaintiff must repeat this process for each civil right that was
13 violated. Plaintiff may allege only one claim per count.

14 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
15 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
16 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
17 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
18 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
19 565, 567 (9th Cir. 1987).

20 **V. Warnings**

21 **A. Address Changes**

22 Plaintiff must file and serve a notice of a change of address in accordance with Rule
23 83-182(f) and 83-183(b) of the Local Rules of Civil Procedure. Plaintiff must not include
24 a motion for other relief with a notice of change of address. Failure to comply may result in
25 dismissal of this action.

26 **B. Copies**

27
28

1 Plaintiff must submit an additional copy of every filing for use by the Court. See
2 LRCiv 5-133(d)(2). Failure to comply may result in the filing being stricken without further
3 notice to Plaintiff.

4 **C. Possible “Strike”**

5 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
6 to file an amended complaint correcting the deficiencies identified in this Order, the
7 dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
8 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
9 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
10 occasions, while incarcerated or detained in any facility, brought an action or appeal in a
11 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
12 or fails to state a claim upon which relief may be granted, unless the prisoner is under
13 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

14 **D. Possible Dismissal**

15 If Plaintiff fails to timely comply with every provision of this Order, including these
16 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
17 1260-61 (a district court may dismiss an action for failure to comply with any order of the
18 Court).

19 **IT IS ORDERED:**

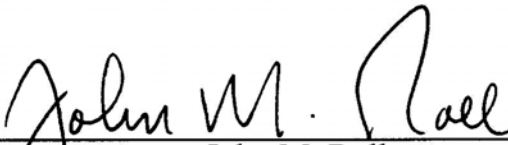
20 (1) The Complaint (Doc. # 1) is **dismissed** for failure to state a claim. Plaintiff has
21 **30 days** from the date this Order is filed to file an amended complaint in compliance with
22 this Order.

23 (2) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
24 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
25 that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

26 (3) The Clerk of Court must include with this Order a copy of this judge’s required
27 form for filing a civil rights complaint by a prisoner.

28 DATED this 3rd day of April, 2009.

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John M. Roll
Chief United States District Judge

Instructions for a Prisoner Filing a Civil Rights Complaint in the United States District Court for the Eastern District of California

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.
2. The Form. The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.
3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. The Filing Fee. The filing fee for this action is \$350.00. If you are unable to immediately pay the filing fee, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.
5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**
7. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

8. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

9. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

10. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

11. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.

2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.

3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for

federal defendants; or “other.” If you mark “other,” identify the source of that authority.

2. Location. Identify the institution and city where the alleged violation of your rights occurred.

3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. Counts. You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**

2. Issue Involved. Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked “Other,” you must identify the specific issue involved.

3. Supporting Facts. After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.

4. Injury. State precisely how you were injured by the alleged violation of your rights.

5. Administrative Remedies. You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

(Full Name of Plaintiff) Plaintiff,

vs.

CASE NO. _____
(To be supplied by the Clerk)

(1) _____
(Full Name of Defendant)

(2) _____

(3) _____

(4) _____

Defendant(s).

Check if there are additional Defendants and attach page 1-A listing them.

**CIVIL RIGHTS COMPLAINT
BY A PRISONER**

- Original Complaint
- First Amended Complaint
- Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:

- 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
- 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
- Other: _____

2. Institution/city where violation occurred: _____

B. DEFENDANTS

- 1. Name of first Defendant: _____ . The first Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 2. Name of second Defendant: _____ . The second Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 3. Name of third Defendant: _____ . The third Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
- 4. Name of fourth Defendant: _____ . The fourth Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

- 1. Have you filed any other lawsuits while you were a prisoner? Yes No
- 2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 - 1. Parties: _____ v. _____
 - 2. Court and case number: _____
 - 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count I.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies:**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count I? Yes No
c. Did you appeal your request for relief on Count I to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.