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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KEVIN LAQUAN TRICE,	)	1:08-cv-01891-AWI-SMS
	)	
Plaintiff,	)	ORDER DISMISSING PLAINTIFF'S
v.	)	COMPLAINT WITH LEAVE TO FILE AN
	)	AMENDED COMPLAINT NO LATER THAN
MODESTO CITY POLICE	)	THIRTY DAYS AFTER THE DATE OF
DEPARTMENT, et al.,	)	SERVICE OF THIS ORDER (DOC. 1)
	)	
Defendants.	)	ORDER DIRECTING THE CLERK TO SEND
	)	TO PLAINTIFF A CIVIL RIGHTS
	)	COMPLAINT FORM FOR A PERSON IN
	)	CUSTODY

Plaintiff is proceeding pro se with an action for damages and other relief concerning alleged civil rights violations. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304. Pending before the Court is Plaintiff's application to proceed in forma pauperis and his complaint, both filed on December 9, 2008.

I. Application to Proceed in Forma Pauperis

Plaintiff has made the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

1 Plaintiff is obligated to pay the statutory filing fee of  
2 \$350.00 for this action. 28 U.S.C. § 1915(b)(1). Plaintiff is  
3 obligated to make monthly payments in the amount of twenty  
4 percent of the preceding month's income credited to Plaintiff's  
5 trust account.

6 II. Directions to the Department of Corrections

7 The California Department of Corrections is required to send  
8 to the Clerk of the Court payments from Plaintiff's account each  
9 time the amount in the account exceeds \$10.00, until the  
10 statutory filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

11 III. Screening the Complaint

12 A. Legal Standards

13 The Court must screen complaints brought by prisoners  
14 seeking relief against a governmental entity or officer. 28  
15 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion  
16 thereof if the Court determines that an allegation of poverty is  
17 untrue or that the action is 1) frivolous or malicious, 2) fails  
18 to state a claim upon which relief may be granted, or 3) seeks  
19 monetary relief from a defendant who is immune from such relief.  
20 28 U.S.C. §§ 1915A(b), 1915(e)(2).

21 "Rule 8(a)'s simplified pleading standard applies to all  
22 civil actions, with limited exceptions," none of which applies to  
23 section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506,  
24 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a  
25 complaint must contain "a short and plain statement of the claim  
26 showing that the pleader is entitled to relief . . . ." Fed. R.  
27 Civ. P. 8(a). "Such a statement must simply give the defendant  
28 fair notice of what the plaintiff's claim is and the grounds upon

1 which it rests." Swierkiewicz, 534 U.S. at 512. However, "the  
2 liberal pleading standard... applies only to a plaintiff's  
3 factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9  
4 (1989).

5 Although a complaint attacked by a Rule 12(b)(6) motion to  
6 dismiss does not need detailed factual allegations, a plaintiff  
7 does not meet his or her obligation to provide the grounds of  
8 entitlement to relief by supplying only conclusions, labels, or a  
9 formulaic recitation of the elements of a claim. Bell Atlantic  
10 Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007). Factual  
11 allegations must be sufficient, when viewed in light of common  
12 experience, to raise a right to relief above the speculative  
13 level and to provide plausible grounds to suggest and infer the  
14 element, or to raise a reasonable expectation that discovery will  
15 reveal evidence of the required element. Bell, 127 S.Ct. at 1965.

16 In reviewing a complaint under this standard, the Court  
17 must accept as true the allegations of the complaint in question,  
18 Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740  
19 (1976), construe the pro se pleadings liberally in the light most  
20 favorable to the Plaintiff, Resnick v. Hayes, 213 F.3d 443, 447  
21 (9<sup>th</sup> Cir. 2000), and resolve all doubts in the Plaintiff's favor,  
22 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Once a claim has  
23 been stated adequately, it may be supported by showing any set of  
24 facts consistent with the allegations of the complaint, and it  
25 may not be dismissed based on a court's assessment that the  
26 plaintiff will fail to find evidence to support the allegations  
27 or prove the claim to the satisfaction of the finder of fact.  
28 Bell, 127 S.Ct. at 1969.

1           If the Court determines that the complaint fails to state a  
2 claim, leave to amend should be granted to the extent that the  
3 deficiencies of the complaint can be cured by amendment. Lopez v.  
4 Smith, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000) (en banc). Dismissal  
5 of a pro se complaint for failure to state a claim is proper only  
6 where it is obvious that the Plaintiff cannot prevail on the  
7 facts that he has alleged and that an opportunity to amend would  
8 be futile. Lopez v. Smith, 203 F.3d at 1128.

9           A claim is frivolous if it lacks an arguable basis either in  
10 law or fact. Neitzke v. Williams, 490 U.S. 319, 324 (1989). A  
11 frivolous claim is based on an inarguable legal conclusion or a  
12 fanciful factual allegation. Id. A federal court may dismiss a  
13 claim as frivolous if it is based on an indisputably meritless  
14 legal theory or if the factual contentions are clearly baseless.  
15 Id.

16           The test for malice is a subjective one that requires the  
17 Court to determine whether the applicant is proceeding in good  
18 faith. Kinney v. Plymouth Rock Squab. Co., 236 U.S. 43, 46  
19 (1915); see Wright v. Newsome, 795 F.2d 964, 968 n. 1 (11<sup>th</sup> Cir.  
20 1986). A lack of good faith is most commonly found in repetitive  
21 suits filed by plaintiffs who have used the advantage of cost-  
22 free filing to file a multiplicity of suits. A complaint may be  
23 inferred to be malicious if it suggests an intent to vex the  
24 defendants or abuse the judicial process by relitigating claims  
25 decided in prior cases, Crisafi v. Holland, 655 F.2d 1305, 1309  
26 (D.C.Cir. 1981); if it threatens violence or contains  
27 disrespectful references to the Court, id.; or if it contains  
28 untrue material allegations of fact or false statements made with

1 knowledge and an intent to deceive the Court, Horsev v. Asher,  
2 741 F.2d 209, 212 (8<sup>th</sup> Cir. 1984).

3 B. Plaintiff's Complaint

4 Plaintiff is serving a sentence of imprisonment for life  
5 without the possibility of parole for the murder of Jose Ruiz,  
6 committed in the course of a robbery of the victim's home in  
7 Modesto early March 2002. (Cmplt. pp. 21, Doc. 1-2 p. 55.) In a  
8 twenty-seven page complaint followed by approximately 175  
9 additional pages of exhibits, Plaintiff sues the Modesto Police  
10 Department as well as the Chief of Police and individual officers  
11 thereof, and the Stanislaus County District Attorney's Office and  
12 two deputy district attorneys, seeking damages and declaratory  
13 relief (impeachment and/or fining of officers) with respect to  
14 alleged civil rights violations occurring in the course of the  
15 investigation of the murder and Plaintiff's arrest and detention  
16 as well as alleged errors in the trial proceedings that resulted  
17 in his conviction. Plaintiff's allegations are generally that the  
18 police officers and prosecutors acted in concert to arrest and  
19 interrogate Plaintiff and charge and convict him of the crime  
20 unlawfully based on false or fraudulent evidence.

21 C. Civil Rights Violations

22 The Civil Rights Act under which this action was filed  
23 provides:

24 Every person who, under color of [state law]...  
25 subjects, or causes to be subjected, any citizen of the  
26 United States... to the deprivation of any rights,  
27 privileges, or immunities secured by the  
28 Constitution... shall be liable to the party injured in  
an action at law, suit in equity, or other proper  
proceeding for redress.

42 U.S.C. § 1983. To state a claim pursuant to § 1983, a

1 plaintiff must plead that defendants acted under color of state  
2 law at the time the act complained of was committed and that the  
3 defendants deprived the plaintiff of rights, privileges, or  
4 immunities secured by the Constitution or laws of the United  
5 States. Gibson v. United States, 781 F.2d 1334, 1338 (9<sup>th</sup> Cir.  
6 1986).

7 Further, the statute plainly requires that there be an  
8 actual connection or link between the actions of the defendants  
9 and the deprivation alleged to have been suffered by plaintiff.  
10 See Monell v. Department of Social Services, 436 U.S. 658,  
11 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). The Ninth Circuit  
12 has held that "[a] person 'subjects' another to the deprivation  
13 of a constitutional right, within the meaning of section 1983, if  
14 he does an affirmative act, participates in another's affirmative  
15 acts or omits to perform an act which he is legally required to  
16 do that causes the deprivation of which complaint is made."  
17 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 D. Heck v. Humphrey

19 Although Plaintiff alleges that he was convicted, he does  
20 not allege that his conviction has been reversed or otherwise  
21 invalidated.

22 The allegations of the complaint are disorganized,  
23 conclusional, and uncertain in some respects, but Plaintiff  
24 alleges that he was arrested and subjected to a search without  
25 probable cause at a time when Plaintiff had suffered gunshot  
26 wounds to the chest and stomach and was being transported to and  
27 treated in a hospital for the wound; Defendant police officers  
28 thereby violated his rights under the Fourth Amendment protecting

1 against unreasonable searches and seizures. (Cmplt. pp. 4.)  
2 Plaintiff alleges in a conclusional fashion that the Defendants  
3 engaged in a conspiracy based on their employment. (Cmplt. pp.  
4 11-13.) It appears that the gist of Plaintiff's complaint is that  
5 the evidence upon which the police relied, which was apparently  
6 later introduced at trial and was the basis of the conviction,  
7 was fraudulent or fabricated. (Id. at 13-14.)

8       When a prisoner challenges the legality or duration of his  
9 custody, or raises a constitutional challenge which could entitle  
10 him to an earlier release, his sole federal remedy is a writ of  
11 habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973); Young  
12 v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied 11 S.Ct.  
13 1090 (1991). Moreover, when seeking damages for an allegedly  
14 unconstitutional conviction or imprisonment, "a § 1983 plaintiff  
15 must prove that the conviction or sentence has been reversed on  
16 direct appeal, expunged by executive order, declared invalid by a  
17 state tribunal authorized to make such determination, or called  
18 into question by a federal court's issuance of a writ of habeas  
19 corpus, 28 U.S.C. § 2254." Heck v. Humphrey, 512 U.S. 477, 487-88  
20 (1994). "A claim for damages bearing that relationship to a  
21 conviction or sentence that has not been so invalidated is not  
22 cognizable under § 1983." Id. at 488. Under Heck v. Humphrey, 512  
23 U.S. 477 (1994), a § 1983 action that would call into question  
24 the lawfulness of a plaintiff's conviction or confinement is not  
25 cognizable unless the plaintiff can prove that his conviction or  
26 sentence has been reversed on direct appeal. The Heck principle  
27 applies to claims that would necessarily imply the invalidity of  
28 any conviction that might have resulted from the prosecution of

1 the dismissed charge, including pending charges in addition to  
2 actual convictions. Harvey v. Waldron, 210 F.3d 1008, 1013-14  
3 (9<sup>th</sup> Cir. 2000) (overruled on a related point concerning the  
4 accrual of claims in Wallace v. Kato, 549 U.S. 384 (2007)).

5 The bar of Heck applies generally to claims of unlawful or  
6 false arrest that are in turn based on challenges to the validity  
7 or sufficiency of evidence relied upon to detain, arrest, and  
8 convict an individual. Cabrera v. City of Huntington Park, 159  
9 F.3d 374, 380 (9<sup>th</sup> Cir. 1998); Harvey v. Waldron, 210 F.3d at  
10 1014-16. The bar of Heck also applies to Plaintiff's claim that  
11 he was maliciously and unlawfully interrogated and prosecuted.  
12 Guerrero v. Gates, 442 F.3d 697, 703-04 (9<sup>th</sup> Cir. 2006).

13 Plaintiff raises many claims relating to the course of the  
14 trial proceedings, such as prosecutorial misconduct,  
15 instructional error, and violations of Plaintiff's rights to  
16 notice of his rights and the accusations against him, to counsel,  
17 to due process with respect to evidentiary rulings and discovery,  
18 to a speedy trial, and protection against double jeopardy.  
19 (Cmplt. pp. 13-14, 17, 21-24.) Such claims, if made out, would  
20 necessarily bear upon the invalidity of his conviction and thus  
21 are barred by Heck.

22 Because all of these claims are barred by Heck, they must be  
23 dismissed.

24 However, although Plaintiff has not alleged that his  
25 conviction has been invalidated, it is possible that Plaintiff  
26 could allege such a fact or other facts stating a claim upon  
27 which relief could be granted. Accordingly, Plaintiff will be  
28 given leave to file an amended complaint with respect to such



1 claims.

2 E. Unlawful Search and Seizure

3 As to Plaintiff's allegation that he was searched and his  
4 cash was seized by unspecified defendants (Cmplt. at pp. 7, 16-  
5 18), the Court interprets Plaintiff's allegations as an assertion  
6 that the intrusions were accomplished without probable cause.

7 To prevail on a § 1983 claim for false arrest and  
8 imprisonment, a plaintiff has to demonstrate that there is no  
9 probable cause to arrest him or other justification. Cabrera v.  
10 City of Huntington Park, 159 F.3d 374, 380 (9<sup>th</sup> Cir. 1998);  
11 Dubner v. City and County of San Francisco, 266 F.3d 959, 964-65  
12 (9<sup>th</sup> Cir. 2001). An officer may arrest a person without a warrant  
13 if there is probable cause to believe that the person has  
14 committed or is committing an offense. Michigan v. DeFillippo,  
15 443 U.S. 31, 36 (1979). "Probable cause" to justify an arrest  
16 means facts and circumstances within the officer's knowledge that  
17 are sufficient to warrant a prudent person in believing, in the  
18 circumstances shown, that the person has committed, is  
19 committing, or is about to commit an offense. Id. at 37.

20 Probable cause to search is present where the facts and  
21 circumstances known to the officer conducting the search are  
22 sufficient to warrant persons of reasonable prudence in the  
23 belief that contraband or evidence of a crime will be present.  
24 Brinegar v. United States, 338 U.S. 160, 175-76 (1949). Each case  
25 is determined on its own specific facts and circumstances.  
26 Ornelas v. United States, 517 U.S. 690, 695-96 (1996). It is the  
27 concrete factual circumstances of a case that will determine the  
28 scope of the Fourth Amendment's reach. Terry v. Ohio, 392 U.S. 1,

1 29 (1968). Thus, the events leading up to the detention or  
2 search, when viewed from the standpoint of an objectively  
3 reasonable police officer, are the ingredients to the probable  
4 cause determination. Ornelas v. United States, 517 U.S. 690, 696-  
5 97 (1996). It is not sufficient to state that probable cause is  
6 lacking; rather, the pertinent circumstances of the search,  
7 including but not limited to the facts known at the time, the  
8 persons conducting the search, the time and place of the search,  
9 what and/or who was searched, the manner of the search, and so  
10 forth, must be set forth.

11 Here, Plaintiff states only that unspecified defendants's  
12 detaining and searching Plaintiff was done without probable  
13 cause. (Cmplt. pp. 4, 13.) Plaintiff states only legal  
14 conclusions. The precise nature and extent of his claim are not  
15 clear.

16 Further, it is not clear whether or not the alleged conduct  
17 resulted in the acquisition of evidence that was used as a basis  
18 for his conviction. Thus, it cannot be determined whether or not  
19 this claim would call into question the lawfulness of a  
20 plaintiff's conviction or confinement.

21 However, although Plaintiff has not alleged that his  
22 conviction has been invalidated, it is possible that Plaintiff  
23 could allege such a fact or other facts stating a claim regarding  
24 violations of the Fourth Amendment concerning search and/or  
25 seizure upon which relief could be granted. Accordingly,  
26 Plaintiff will be given leave to file an amended complaint with  
27 respect to such claims.

28 /////

1           F. Photograph of Plaintiff's Injuries

2           Plaintiff alleges that the officers photographed him after  
3 his surgery, while he was in severe pain, without his consent and  
4 while he was medicated, and in the absence of probable cause or  
5 reasonable suspicion. (Cmplt. p. 7.)

6           It is not clear whether or not Plaintiff intended this to be  
7 part and parcel of a Fourth Amendment claim or whether or not any  
8 use of the photograph was made in the criminal proceedings which  
9 resulted in Plaintiff's conviction. To the extent that Plaintiff  
10 intended a Fourth Amendment claim, the Court reiterates its  
11 previous discussion regarding the need for Plaintiff to set forth  
12 all the facts and circumstances of any search or seizure claim.

13           With respect to a right of privacy, it is established that  
14 there is a constitutionally protected interest in avoiding  
15 disclosure of personal matters, including medical information.  
16 Nelson v. National Aeronautics and Space Administration, 512 F.3d  
17 1134, 1144 (9<sup>th</sup> Cir. 2008) (quoting Norman-Bloodsaw v. Lawrence  
18 Berkeley Laboratory, 135 F.3d 1260, 1269 (9<sup>th</sup> Cir. 1998)). In Yin  
19 v. State of California, 95 F.3d 864, 871 n. 12 (9<sup>th</sup> Cir. 1996),  
20 the court recognized a privacy interest in medical information,  
21 including diagnosis and medical records, that was protected under  
22 the Fourth Amendment and the Due Process Clause of the Fifth or  
23 Fourteenth Amendments. The right to informational privacy is not  
24 absolute, but is conditional and may be infringed upon a showing  
25 of a proper governmental interest. In re Crawford, 194 F.3d 954,  
26 959 (9<sup>th</sup> Cir. 1999). Relevant factors to be considered are case-  
27 specific, but generally include the type of record requested, the  
28 information contained therein, the potential for harm in any

1 subsequent nonconsensual disclosure, the injury from disclosure  
2 to the relationship in which the record was generated, the  
3 adequacy of safeguards to prevent unauthorized disclosure, the  
4 degree of need for access, and whether there is an express  
5 statutory mandate, articulated public policy, or other  
6 recognizable public interest militating toward access. Id. In  
7 each case in which governmental action compels disclosure of  
8 private information, the government has the burden of showing  
9 that its use of the information would advance a legitimate state  
10 interest and that its actions are narrowly tailored to meet the  
11 legitimate interest. Id.

12         It has been held that the distribution to other officers of  
13 nude photographs of an assault victim in obscene positions, taken  
14 without her consent by officers during her visit to a police  
15 station to report the assault, was a violation of the right of  
16 privacy protected by the Fourteenth Amendment. York v. Story, 324  
17 F.2d 450, 454-56 (9<sup>th</sup> Cir. 1963), cert. denied, Story v. York,  
18 376 U.S. 939 (1964). The court in York noted that the security of  
19 one's privacy against arbitrary intrusion by the police is basic  
20 to a free society and is implicit in the concept of ordered  
21 liberty embraced with the Fourteenth Amendment's due process  
22 clause; further, the naked body is a basic subject of privacy  
23 that is imbued with considerations of elementary self-respect and  
24 personal dignity. 324 F.2d at 455. However, the presence of a  
25 sufficiently weighty governmental interest can constitute a  
26 circumstance sufficient to counterbalance the intrusion involved  
27 in taking and distributing photographs. It has been held that  
28 generalized observation from a distance of nude male prisoners

1 and routine pat-down searches over clothing by female guards of  
2 male prisoners in the course of maintaining prison security does  
3 not constitute an actionable invasion of privacy. Grummett v.  
4 Rushen, 779 F.2d 491, 494-95 (9<sup>th</sup> Cir. 1985). Further, it has  
5 been held that no violation of privacy is present where officers  
6 investigate a shooting incident in which the plaintiff was shot  
7 by a police officer while trying to leave the scene of a routine  
8 traffic stop and, in the course of the investigation of the case,  
9 obtain from a financial lending agency a medical report  
10 concerning Plaintiff's physical condition. Hopper v. Hayes, 573  
11 F.Supp. 1368, 1373 (D.C. Idaho 1983). In Hopper, the court  
12 reasoned that there was no issue of fact as to a violation of  
13 privacy in view of the absence of a showing of deprivation of  
14 elementary self-respect, and further considering the presence of  
15 an additional policy consideration, namely, the policy in favor  
16 of enabling the police to conduct bona fide investigations  
17 wherein they question and request information from third parties.  
18 Id. at p. 1373.

19 Here, the only facts alleged are that the police  
20 photographed Plaintiff after surgery. The circumstances, such as  
21 the facts prompting the photograph, the identity of the person  
22 taking the picture, the nature and circumstances of the taking of  
23 the photograph, and the use of the photograph, are not set forth.  
24 It appears that at the time Plaintiff was in the hospital, the  
25 law enforcement officers were investigating a homicide. Without  
26 further circumstances set forth, there does not appear to have  
27 been any deprivation of elementary self-respect, and the  
28 government appears to have been proceeding pursuant to a

1 legitimate and, depending upon the circumstances, potentially  
2 compelling interest. Accordingly, it does not appear that  
3 Plaintiff has alleged an actionable claim of violation of privacy  
4 as guaranteed by the Fourteenth Amendment.

5       However, because it is possible that Plaintiff may allege  
6 further facts that might state a claim, Plaintiff will be granted  
7 leave to file an amended complaint.

8           G. Claim relating to Medical Care

9       Plaintiff alleges that before and after his arrest in March  
10 2002, he was hospitalized. He allegedly suffered an initial delay  
11 in hospitalization due to his being airlifted to a hospital in  
12 Merced instead of being treated in Atwater. He underwent multiple  
13 surgeries for his gunshot wound and was released to the  
14 Stanislaus County Jail. (Cmplt. at 20.) He alleges in a  
15 conclusional fashion that while at the jail he was deprived of  
16 adequate, meaningful, and effective medical care, including  
17 deprivation of dressing changes and pain medications prescribed  
18 by the doctors in the intensive care unit at the hospital in  
19 Modesto; he suffered gross medical negligence that caused  
20 internal infections for two years. (Cmplt. pp 20-21.)

21       A pretrial detainee's right to medical care is governed by  
22 the substantive due process clause of the Fourteenth Amendment,  
23 and a detainee's right is at least as great as that of a  
24 convicted prisoner. City of Revere v. Massachusetts General  
25 Hospital, 463 U.S. 239, 244-5 (1983); Lolli v. County of Orange,  
26 351 F.3d 410, 418-19 (9<sup>th</sup> Cir. 2003). Even though the claim  
27 proceeds on Fourteenth Amendment grounds, traditional Eighth  
28 Amendment standards govern the claim. Lolli, 351 F.3d at 418-19.

1 A plaintiff must show that 1) he was confined under conditions  
2 posing a risk of objectively, sufficiently serious harm, and 2)  
3 the officials in question had a sufficiently culpable state of  
4 mind in denying the proper medical care. Id. at 419.

5 Under the Eighth Amendment and under a substantive due  
6 process analysis, a prisoner's claim of inadequate medical care  
7 does not constitute cruel and unusual punishment unless the  
8 mistreatment rises to the level of "deliberate indifference to  
9 serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106  
10 (1976); Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9<sup>th</sup> Cir.  
11 2002.) The "deliberate indifference" standard involves an  
12 objective and a subjective prong. First, the alleged deprivation  
13 must be, in objective terms, "sufficiently serious." Farmer v.  
14 Brennan, 511 U.S. 825, 834 (1994) (citing Wilson v. Seiter, 501  
15 U.S. 294, 298 (1991)). Second, the prison official must act with  
16 a "sufficiently culpable state of mind," which entails more than  
17 mere negligence, but less than conduct undertaken for the very  
18 purpose of causing harm. Farmer v. Brennan, 511 U.S. at 837. A  
19 prison official does not act in a deliberately indifferent manner  
20 unless the official "knows of and disregards an excessive risk to  
21 inmate health or safety." Id.

22 In applying this standard, the Ninth Circuit has held that  
23 before it can be said that a prisoner's civil rights have been  
24 abridged, "the indifference to his medical needs must be  
25 substantial. Mere 'indifference,' 'negligence,' or 'medical  
26 malpractice' will not support this cause of action." Broughton v.  
27 Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980), citing  
28 Estelle, 429 U.S. at 105-06. "[A] complaint that a physician has

1 been negligent in diagnosing or treating a medical condition does  
2 not state a valid claim of medical mistreatment under the Eighth  
3 Amendment. Medical malpractice does not become a constitutional  
4 violation merely because the victim is a prisoner." Estelle v.  
5 Gamble, 429 U.S. at 106; see also Anderson v. County of Kern, 45  
6 F.3d 1310, 1316 (9th Cir. 1995); McGuckin v. Smith, 974 F.2d  
7 1050, 1050 (9th Cir. 1992), overruled on other grounds, WMX  
8 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
9 banc). Even gross negligence is insufficient to establish  
10 deliberate indifference to serious medical needs. See Wood v.  
11 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990). A prisoner's  
12 mere disagreement with diagnosis or treatment does not support a  
13 claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240,  
14 242 (9th Cir. 1989).

15 Here, Plaintiff has referred to gross negligence; he has  
16 alleged only that he no longer received the same care with  
17 respect to dressings and pain medication that he was receiving in  
18 the hospital, and that infections resulted for a substantial  
19 period of time. Plaintiff's factual allegations are not  
20 sufficient, when viewed in light of common experience, to raise a  
21 right to relief above the speculative level and to provide  
22 plausible grounds to suggest and infer the element of deliberate  
23 indifference, or to raise a reasonable expectation that discovery  
24 will reveal evidence of the required element. Plaintiff will be  
25 given an opportunity to state additional facts in an amended  
26 complaint.

#### 27 H. Racial Profiling

28 Plaintiff purports to state a claim for racial profiling of



1 African-American citizens in stops, arrests, detentions, and  
2 "bogus" convictions. Plaintiff refers to racial profiling and  
3 claims that unspecified defendants had failed to train,  
4 supervise, and discipline all defendants or a group of persons  
5 referred to as unspecified police officers, detectives, and  
6 county and government officials and employees with respect to  
7 "race profiling African American Citizens." (Complt. p. 5.)

8 A claim for racial profiling would not appear to be based on  
9 the Fourth Amendment because it is established that outside  
10 limited contexts, such as inventory and administrative inspection  
11 searches, an officer's motive does not invalidate what is  
12 otherwise objectively justifiable behavior under the Fourth  
13 Amendment; rather, the correct basis for objecting to  
14 intentionally discriminatory application of laws is the Equal  
15 Protection Clause. See, Whren v. United States, 517 U.S. 806,  
16 812-13 (1996).

17 To state a § 1983 claim for violation of the Equal  
18 Protection clause, a plaintiff must show that he was treated in a  
19 manner inconsistent with others similarly situated, and the  
20 defendants acted with an intent or purpose to discriminate  
21 against the plaintiff based upon membership in a protected class.  
22 Thornton v. City of St. Helens, 425 F.3d 1158, 1166-67 (9<sup>th</sup> Cir.  
23 2005).

24 Plaintiff has stated no facts in support of his claim of  
25 racial profiling except to allege that he was the victim of it  
26 with respect to the Defendants' actions in investigating the  
27 murder, arresting him, and prosecuting him. He has not alleged  
28 facts showing intentional discrimination, or differential

1 treatment of others similarly situated. However, because it is  
2 possible that Plaintiff could allege facts stating such a claim,  
3 Plaintiff will be given leave to file an amended complaint.

4 I. Linkage

5 The civil rights statute plainly requires that there be an  
6 actual connection or link between the actions of the defendants  
7 and the deprivation alleged to have been suffered by plaintiff.

8 See Monell v. Department of Social Services, 436 U.S. 658

9 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). The Ninth Circuit

10 has held that "[a] person 'subjects' another to the deprivation

11 of a constitutional right, within the meaning of section 1983, if

12 he does an affirmative act, participates in another's affirmative

13 acts or omits to perform an act which he is legally required to

14 do that causes the deprivation of which complaint is made."

15 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). In order to

16 state a claim for relief under section 1983, plaintiff must link

17 each named defendant with some affirmative act or omission that

18 demonstrates a violation of plaintiff's federal rights.

19 Plaintiff sometimes refers to Defendants as a group and does

20 not specify which individual or specific entity has been involved

21 in a particular violation. On other occasions, Plaintiff

22 describes actions without identifying the person or entity

23 responsible for the action. Plaintiff is informed that if he

24 files an amended complaint, he must provide facts identifying the

25 particular defendant or defendants involved in any particular

26 action alleged to have been a violation of his rights.

27 J. Supervisory Liability

28 Plaintiff alleges that a the Chief of the Modesto Police

1 Department, named as a "Doe" defendant, was responsible for the  
2 training and conduct of the police officers who are named in the  
3 complaint. (Cmplt. pp. 10-11.)

4 In order for a person acting under color of state law to be  
5 liable under § 1983, the person must be shown to have personally  
6 participated in the alleged deprivation of rights; there is no  
7 respondeat superior liability. Bell v. Clackamas County, 341 F.3d  
8 858, 867 (9<sup>th</sup> Cir. 2003). However, a supervisor may be held  
9 liable for the constitutional violations of subordinates if the  
10 supervisor participated in, or directed, the violations, or knew  
11 of the violations and failed to act to prevent them. Hydrick v.  
12 Hunter, 500 F.3d 978, 988 (9<sup>th</sup> Cir. 2007).

13 Here, Plaintiff has failed to allege a basis for individual  
14 liability of the supervisor of the defendant officers. However,  
15 because it is possible that Plaintiff could allege such facts,  
16 Plaintiff will be given an opportunity to amend the complaint in  
17 this regard.

18 K. Capacity of the Parties

19 Plaintiff alleges that the individual defendants are sued in  
20 their individual and official capacities.

21 A suit against a governmental officer in his official  
22 capacity is equivalent to a suit against the governmental entity  
23 itself. Mitchell v. Dupnik, 75 F.3d 517, 527 (9<sup>th</sup> Cir. 1996).  
24 When officers in their official capacity and the local government  
25 entity for whom they work are both named in a lawsuit, the  
26 officers in their official capacity are redundant defendants and  
27 may be dismissed in that capacity. Wisler v. City of Fresno, 2007  
28 U.S. Dist. LEXIS 18666, \*19 (E.D.Cal. 2007); Luke v. Abbott, 954

1 F.Supp. 202, 203-04 (C.D.Cal. 1997).

2 Plaintiff states that he sues the Defendants in their  
3 official and individual capacities. (Cmplt. pp. 10-11.) The  
4 police department and the district attorney's office are already  
5 parties. To the extent that Plaintiff sues individual officers  
6 and employees of local governmental entities in their official  
7 capacities, Plaintiff's claims should be dismissed because they  
8 are redundant.

9 L. Prosecutorial Immunity

10 Plaintiff sues Assistant District Attorney Douglas Maner and  
11 Deputy District Attorney Birgit Fladager for charging Plaintiff  
12 and engaging in an unlawful prosecution that allegedly included  
13 subornation of perjury, intentional suppression of evidence, the  
14 use of illegally obtained evidence, and other prosecutorial  
15 misconduct. (Cmplt. pp. 11-14, 20-26.)

16 State prosecutors are absolutely immune from civil liability  
17 for acts taken in their official capacity that are closely  
18 associated with the judicial process, such as initiating  
19 prosecution and presenting the state's case. Imbler v. Pachtman,  
20 424 U.S. 409, 427, 430-431 (1976); Milstein v. Cooley, 257 F.3d  
21 1004, 1008 (9<sup>th</sup> Cir. 2001).

22 Thus, Plaintiff's claims against the prosecutors must be  
23 dismissed because of their absolute immunity for such conduct.  
24 However, Plaintiff will be given an opportunity to amend the  
25 complaint.

26 M. Conspiracy

27 Plaintiff alleges in a conclusional fashion that the  
28 Defendants conspired with each other and performed actions

1 "concertedly by affirmative link of employment by" the County of  
2 Stanislaus. (Cmplt. pp. 11-12, 13.)

3 A conspiracy claim brought under section 1983 requires proof  
4 of "'an agreement or meeting of the minds to violate  
5 constitutional rights,'" Franklin v. Fox, 312 F.3d 423, 441 (9th  
6 Cir. 2001) (quoting United Steel Workers of Am. v. Phelps Dodge  
7 Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989) (citation  
8 omitted)), and an actual deprivation of constitutional rights,  
9 Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting  
10 Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th  
11 Cir. 1989)). "'To be liable, each participant in the conspiracy  
12 need not know the exact details of the plan, but each participant  
13 must at least share the common objective of the conspiracy.'" Franklin,  
14 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d  
15 at 1541).

16 The federal system is one of notice pleading, and the court  
17 may not apply a heightened pleading standard to plaintiff's  
18 allegations of conspiracy. Empress LLC v. City and County of San  
19 Francisco, 419 F.3d 1052, 1056 (9th Cir. 2005); Galbraith v.  
20 County of Santa Clara, 307 F.3d 1119, 1126 (2002). However,  
21 although accepted as true, the "[f]actual allegations must be  
22 [sufficient] to raise a right to relief above the speculative  
23 level...." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965  
24 (2007) (citations omitted). A plaintiff must set forth "the  
25 grounds of his entitlement to relief[,]" which "requires more  
26 than labels and conclusions, and a formulaic recitation of the  
27 elements of a cause of action ...." Id. at 1964-65 (internal  
28 quotations and citations omitted). As such, a bare allegation

1 that defendants conspired to violate plaintiff's constitutional  
2 rights will not suffice to give rise to a conspiracy claim under  
3 section 1983.

4 A claim brought for violation of section 1985(3) requires  
5 "four elements: (1) a conspiracy; (2) for the purpose of  
6 depriving, either directly or indirectly, any person or class of  
7 persons of the equal protection of the laws, or of equal  
8 privileges and immunities under the laws; and (3) an act in  
9 furtherance of this conspiracy; (4) whereby a person is either  
10 injured in his person or property or deprived of any right or  
11 privilege of a citizen of the United States." Sever v. Alaska  
12 Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citation  
13 omitted). A racial, or perhaps otherwise class-based,  
14 invidiously discriminatory animus is an indispensable element of  
15 a section 1985(3) claim. Sprewell v. Golden State Warriors, 266  
16 F.3d 979, 989 (9th Cir. 2001) (quotations and citation omitted).

17 Plaintiff will be given an opportunity to amend his  
18 complaint with respect to his allegations of conspiracy.

19 IV. Disposition

20 Accordingly, it IS ORDERED that

21 1) Plaintiff's application to proceed in forma pauperis IS  
22 GRANTED; and

23 2) The Director of the California Department of Corrections  
24 or his designee SHALL COLLECT payments from Plaintiff's prison  
25 trust account in an amount equal to twenty per cent (20%) of the  
26 preceding month's income credited to the prisoner's trust account  
27 and SHALL FORWARD those payments to the Clerk of the Court each  
28 time the amount in the account exceeds \$10.00, in accordance with

1 28 U.S.C. § 1915(b)(2), until a total of \$350.00 has been  
2 collected and forwarded to the Clerk of the Court. The payments  
3 SHALL BE clearly identified by the name and number assigned to  
4 this action; and

5 4) The Clerk of the Court IS DIRECTED to serve a copy of  
6 this order and a copy of Plaintiff's in forma pauperis  
7 application on the Director of the California Department of  
8 Corrections, via the Court's electronic case filing system  
9 (CM/ECF); and

10 5) The Clerk of the Court IS DIRECTED to serve a copy of  
11 this order on the Financial Department, U.S. District Court,  
12 Eastern District of California, Fresno Division; and

13 6) Plaintiff's complaint IS DISMISSED with leave to file a  
14 first amended complaint; and

15 7) Plaintiff IS GRANTED thirty days from the date of service  
16 of this order to file an amended complaint that complies with the  
17 requirements of the pertinent substantive law, the Federal Rules  
18 of Civil Procedure, and the Local Rules of Practice; the amended  
19 complaint must bear the docket number assigned this case and must  
20 be labeled "First Amended Complaint"; and Plaintiff IS INFORMED  
21 that the failure to file an amended complaint in accordance with  
22 this order will be considered to be a failure to comply with an  
23 order of the Court pursuant to Local Rule 11-110 and will result  
24 in dismissal of this action. Further, failure to file an amended  
25 complaint that states a claim upon which relief may be granted  
26 will be considered to be grounds for dismissing the complaint  
27 pursuant to 28 U.S.C. § 1915A(b) and will result in dismissal of  
28 the action; and

1           8) The Clerk IS DIRECTED to send to Plaintiff with this  
2 order a blank civil rights complaint form for a person in  
3 custody.

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5 IT IS SO ORDERED.

6 **Dated: January 13, 2009**

**/s/ Sandra M. Snyder**  
**UNITED STATES MAGISTRATE JUDGE**

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