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UNITED STATES DISTRICT COURT7
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EASTERN DISTRICT OF CALIFORNIA10 KEVIN LAQUAN TRICE,) 1:08-cv-01891-AWI-SMS
11 Plaintiff,)
12 v.) ORDER DISMISSING PLAINTIFF'S
13 MODESTO CITY POLICE) COMPLAINT WITH LEAVE TO FILE AN
14 DEPARTMENT, et al.,) AMENDED COMPLAINT NO LATER THAN
15 Defendants.) THIRTY DAYS AFTER THE DATE OF
) SERVICE OF THIS ORDER (DOC. 1)
16 _____)
17) ORDER DIRECTING THE CLERK TO SEND
18) TO PLAINTIFF A CIVIL RIGHTS
19) COMPLAINT FORM FOR A PERSON IN
20) CUSTODY21 Plaintiff is proceeding pro se with an action for damages
22 and other relief concerning alleged civil rights violations. The
23 matter has been referred to the Magistrate Judge pursuant to 28
24 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, 2008.25 I. Application to Proceed in Forma Pauperis26 Plaintiff has made the showing required by 28 U.S.C.
27 § 1915(a). Accordingly, the request to proceed in forma pauperis
28 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 (9th 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 (9th 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 (11th 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, Horsey v. Asher,
2 741 F.2d 209, 212 (8th 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
Constitution... shall be liable to the party injured in
an action at law, suit in equity, or other proper
proceeding for redress.

28 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 (9th 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 (9th 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 (9th 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 (9th 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 (9th Cir. 1998);
11 Dubner v. City and County of San Francisco, 266 F.3d 959, 964-65
12 (9th 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 (9th Cir. 2008) (quoting Norman-Bloodsaw v. Lawrence
18 Berkeley Laboratory, 135 F.3d 1260, 1269 (9th Cir. 1998)). In Yin
19 v. State of California, 95 F.3d 864, 871 n. 12 (9th 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 (9th 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 is 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 (9th 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 (9th 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 (9th 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 (9th 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.

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." (Compl. 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 (9th 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 (9th 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 (9th 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 (9th 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 (9th 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.'"
14 Franklin, 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

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

IT IS SO ORDERED.

Dated: January 13, 2009

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE