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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DONALD CRANEY,

Plaintiff,

v.

DEPAULO,  
Medical Doctor at Avenal State Prison

M.D.. MERRILLS,  
Senior Registered Nurse

Defendants.

CASE NO. 1:10-cv-01827-MJS (PC)

ORDER DISMISSING PLAINTIFF'S  
COMPLAINT WITH LEAVE TO AMEND

(ECF No. 1)

PLAINTIFF'S AMENDED COMPLAINT DUE  
DECEMBER 27, 2011

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**SCREENING ORDER**

Plaintiff Donald Craney ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983

Plaintiff filed this action on October 4, 2010. (Compl., ECF No. 1.) No other parties have appeared in the action.

Plaintiff's Complaint is now before the Court for screening.

1 **I. SCREENING REQUIREMENT**

2 The Court is required to screen complaints brought by prisoners seeking relief  
3 against a governmental entity or officer or employee of a governmental entity. 28  
4 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the  
5 prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a  
6 claim upon which relief may be granted, or that seek monetary relief from a defendant  
7 who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any  
8 filing fee, or any portion thereof, that may have been paid, the court shall dismiss the  
9 case at any time if the court determines that . . . the action or appeal . . . fails to state a  
10 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).  
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13 A complaint must contain “a short and plain statement of the claim showing that  
14 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
15 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
16 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
17 662, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544,  
18 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must set forth “sufficient factual matter,  
19 accepted as true, to ‘state a claim that is plausible on its face.’” Iqbal, 129 S.Ct. at 1949  
20 (quoting Twombly, 550 U.S. at 555). Facial plausibility demands more than the mere  
21 possibility that a defendant committed misconduct and, while factual allegations are  
22 accepted as true, legal conclusions are not. Id. at 1949-50.  
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1 **II. SUMMARY OF COMPLAINT**

2 Plaintiff is a prisoner currently housed at California State Prison at Avenal.  
3 (Compl., ECF No. 1.) Plaintiff seeks to sue Defendant DePaulo for denial of adequate  
4 medical care, claiming “medical (m)alpractice, deliberate indifference, (and)  
5 negligence”. Id. at 3. Plaintiff seeks to sue Defendant Merrills for covering up  
6 Defendant DePaulo’s alleged conduct and denying Plaintiff his inmate appeal rights. Id.  
7 at 3-4. Plaintiff sues Defendant DePaulo in an individual capacity and Defendant  
8 Merrills in an individual and an official capacity. Id. at 3. Plaintiff seeks compensatory  
9 damages of \$200,000 from each of the two Defendants. Id. at 3.  
10

11 Plaintiff’s Complaint alleges the following:

12  
13 On or about July 18, 2008, Plaintiff was treated in the prison medical clinic by  
14 Defendant DePaulo, who provided an antibiotic, doxycycline, for a diagnosed bronchitis  
15 infection. Id. at 10. Plaintiff alleges that doxycycline was an inappropriate treatment  
16 and that Plaintiff suffered an allegeric reaction to the doxycycline, specifically “swelling  
17 of the face, lips, jaws, forehead, headaches, redness of the eyes, itching and swelling  
18 of the testicles.” Id. at 10. On or about July 21, 2008, Plaintiff was treated for the  
19 allergic reaction at the prison medical clinic.  
20

21 On or about August 4, 2008 Plaintiff was transported to Community Regional  
22 Medical Center in non-acute condition suffering from “fever, night  
23 sweats...hypertension...weight loss...redness of the eyes, knee pain, ankle pain, and  
24 elbow pain.” Id. at 18, 21-22. Plaintiff was evaluated, treated and discharged from the  
25 hospital on August 6, 2008. Id. at 18.  
26

27 Plaintiff believes that Defendant Defendant DePaulo was negligent and

1 deliberately indifferent to Plaintiff's medical needs. Plaintiff believes that Defendant  
2 Merrills, who interviewed Plaintiff and reviewed his appeal after the above events above,  
3 engaged in a cover-up or conspiracy and denied Plaintiff his inmate appeal rights.

4  
5 **III. ANALYSIS**

6 Section 1983 "provides a cause of action for the 'deprivation of any rights,  
7 privileges, or immunities secured by the Constitution and laws' of the United States."

8 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).

9 Section 1983 is not itself a source of substantive rights, but merely provides a method  
10 for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386,  
11 393-94, 109 S.Ct. 1865 (1989).

12  
13 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)  
14 that a right secured by the Constitution or laws of the United States was violated, and (2)  
15 that the alleged violation was committed by a person acting under the color of state law.  
16 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,  
17 1245 (9th Cir.1987).

18  
19 **A. Claims Against Defendant DePaulo.**

20 Plaintiff alleges that Defendant DePaulo violated Plaintiff's Eighth Amendment  
21 rights by providing negligent medical care and by being deliberately indifferent to  
22 Plaintiff's medical needs.

23 "[T]o maintain an Eighth Amendment claim based on prison medical treatment,  
24 an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner,  
25 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97  
26

1 S.Ct. 285 (1976)). The two part test for deliberate indifference requires Plaintiff to show  
2 (1) “a serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition  
3 could result in further significant injury or the unnecessary and wanton infliction of pain,”  
4 and (2) “the defendant’s response to the need was deliberately indifferent.” Jett, 439  
5 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992),  
6 overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.  
7 1997) (en banc) (internal quotations omitted).

9 Plaintiff has sufficiently pled a serious medical condition by alleging bronchitis and  
10 an allergic reaction that had potential to cause significant injury. However, Plaintiff has  
11 not shown that Defendant DePaulo was deliberately indifferent to Plaintiff’s medical  
12 needs.

14 To show deliberate indifference, Plaintiff must show “a purposeful act or failure to  
15 respond to a prisoner’s pain or possible medical need, and harm caused by the  
16 indifference.” Id. (citing McGuckin, 974 F.2d at 1060). “Deliberate indifference is a high  
17 legal standard.” Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). “Under this  
18 standard, the prison official must not only ‘be aware of the facts from which the inference  
19 could be drawn that a substantial risk of serious harm exists,’ but that person ‘must also  
20 draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114  
21 S.Ct. 1970 (1994)). “‘If a prison official should have been aware of the risk, but was not,  
22 then the official has not violated the Eighth Amendment, no matter how severe the risk.’”  
23 Id. (quoting Gibson v. Cnty. of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).  
24 “Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of  
25 action.” (quoting Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9<sup>th</sup> Cir. 1980)  
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1 (citing Estelle v. Gamble, 429 U.S. 97, 105-106 (1976)).

2           There is nothing in this pleading to suggest that Defendant DePaulo was  
3 deliberately indifferent to Plaintiff's medical needs. To the contrary, the complaint  
4 alleges that he undertook to treat Plaintiff with an antibiotic, doxycycline. There is no  
5 basis to conclude that Defendant DePaulo knew or should have known of Plaintiff's  
6 apparent allergy to that antibiotic and deliberately disregarded that risk.  
7

8           Plaintiff will be given leave to amend this claim. In his amended complaint Plaintiff  
9 must allege how Defendant DePaulo was aware of Plaintiff's allergy to doxycycline and  
10 set forth the basis, if any, for a contention that defendant DePaulo, or anyone else for  
11 that matter, deliberately disregarded the risk imposed by using that medication or  
12 otherwise acted with deliberate indifference to Plaintiff's needs. The mere allegation  
13 that someone prescribed a medication which in hindsight proved to be inappropriate or  
14 that someone made some other error in medical judgment does not create a cognizable  
15 claim.  
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17           **B.       Claims against Defendant Merrills.**

18           Plaintiff alleges that Defendant Merrills interviewed Plaintiff and reviewed his  
19 appeal after the above events occurred, but did not provide him with the name of the  
20 individual who treated him. He claims that the refusal to identify the treating individual  
21 was in furtherance of a cover-up or conspiracy to hide inadequate medical care and  
22 deny Plaintiff his inmate appeal rights.  
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24           The Due Process Clause of the Fourteenth Amendment prohibits state action that  
25 deprives a person of life, liberty, or property without due process of law. Wolff v.  
26 McDonell, 418 U.S. 539, 556 (1974). Conspiracy under § 1983 merely provides a  
27

1 mechanism by which to plead or prove a constitutional violation or statutory violation.  
2 Landrigan v. City of Warwick, 628 F.2d 736, 742 (1<sup>st</sup> Cir. 1980). Although conspiracy  
3 claims are actionable under § 1983, “it is necessary that there have been, besides the  
4 agreement, an actual deprivation of a right secured by the Constitution and laws.”  
5 Landrigan 628 F.2d at 742. A pro se complaint containing only conclusory, vague, or  
6 general allegations of conspiracy to deprive a person of constitutional rights will not  
7 withstand a motion to dismiss. Zemsky v. City of New York, 821 F.2d 148, 152, 40 Ed.  
8 Law Rep. 106 (2d Cir. 1987).

9  
10 There is nothing in the pleading to suggest that Defendant Merrills took or  
11 participated in any action or inaction designed to deprive Plaintiff of his right to use the  
12 inmate appeal process. Indeed, it appears from the Complaint that Plaintiff did avail  
13 himself of and completed the appeal process. Plaintiff has not met the standard to show  
14 an actual deprivation of any constitutional right.  
15

#### 16 **IV. CONCLUSION AND ORDER**

17  
18 The Court finds that, as pled, Plaintiff’s Complaint fails to state any claim upon  
19 which relief could be granted. From the Court’s review, Plaintiff’s present pleading does  
20 nothing more than suggest that he, regrettably, had an unexpected allergic reaction to a  
21 common medication. Even though that event presumably was very disturbing and  
22 perhaps frightening to Plaintiff, it does not amount to a constitutional violation upon  
23 which he may sue. The same is true with the difficulty apparently encountered in  
24 discovering the name of the medical practitioner who provided the medication. The  
25 Court will give Plaintiff an opportunity to file an amended complaint and allege other  
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1 facts which, if true, show that someone with a duty to act deliberately failed to take steps  
2 to prevent harm to Plaintiff or otherwise deprived him of constitutional rights. Plaintiff  
3 should read this Screening Order carefully and prepare and submit an amended  
4 complaint only if he can therein allege true facts which meet the standards spelled out in  
5 this Order.

6  
7 If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P.  
8 8(a), but must state what each named Defendant did that led to the deprivation of  
9 Plaintiff's constitutional or other federal rights. Iqbal, 129 S.Ct. at 1948-49. Although  
10 accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief  
11 above the speculative level . . . ." Twombly, 550 U.S. at 555 (citations omitted). Further,  
12 Plaintiff may not change the nature of this suit by adding new, unrelated claims in his  
13 amended complaint. George v. Smith 507 F.3d 605 at 607 (C.A. 7 (Wis) 2007)) (no  
14 "buckshot" complaints).

15  
16 An amended complaint supercedes the original complaint, Forsyth v. Humana,  
17 Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.  
18 1987), and must be "complete in itself without reference to the prior or superceded  
19 pleading." Local Rule 220. Therefore, "[a]ll causes of action alleged in an original  
20 complaint which are not alleged in an amended complaint are waived." King, 814 F.2d at  
21 567. The amended complaint should be clearly and boldly titled "Amended Complaint,"  
22 refer to the appropriate case number, and be an original signed under penalty of perjury.

23  
24 Based on the foregoing, it is ORDERED that:

25 1. Plaintiff's Complaint is dismissed for failure to state a claim, with leave to  
26 file an amended complaint curing the deficiencies identified by the Court in this Order.  
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1           2.     The Clerk's Office shall send Plaintiff a civil rights Amended Complaint  
2 form, Plaintiff shall refer to the case number 1:10-cv-01827-MJS (PC).

3           3.     Plaintiff's amended complaint is due December 27, 2011.

4           4.     Plaintiff may not add any new, unrelated claims to his action via his  
5 amended complaint and any attempt to do so will result in an order striking the amended  
6 complaint.  
7

8           5.     If Plaintiff fails to comply with this Order, this action will be dismissed for  
9 failure to prosecute and failure to state a claim upon which relief may be granted.  
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11  
12 IT IS SO ORDERED.

13  
14 Dated: November 20, 2011

15 ci4d6

1st Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE