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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSEPH ANTHONY BROWN,  
  
Plaintiff,

CASE No. 1:11-cv-01562-MJS (PC)  
  
ORDER DISMISSING ACTION FOR  
FAILURE TO STATE A CLAIM  
  
(ECF No. 57)

v.

UNITED STATES OF AMERICA, et al.,  
  
Defendants.

DISMISSAL COUNTS AS A STRIKE  
PURSUANT TO 28 U.S.C. § 1915(g)  
  
CLERK TO CLOSE CASE

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**FOURTH SCREENING ORDER**

**I. PROCEDURAL HISTORY**

Plaintiff Joseph Anthony Brown, a federal prisoner proceeding pro se, filed this action on September 15, 2011 pursuant to 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). (ECF No. 1.)

Plaintiff's Complaint was dismissed by the Court for failure to state a claim, but he

1 was given leave to file an amended pleading. (ECF No. 12.) Plaintiff's First Amended  
2 Complaint and Fourth Amended Complaints likewise were dismissed, with leave to amend,  
3 for failure to state a claim.<sup>1</sup> (ECF Nos. 22, 54.) Plaintiff filed a Fifth Amended Complaint.  
4 (ECF No. 57). The Fifth Amended Complaint is now before the Court for screening.

5  
6 **II. SCREENING REQUIREMENT**

7 The Court is required to screen complaints brought by prisoners seeking relief  
8 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
9 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has  
10 raised claims that are legally "frivolous, malicious," or that fail to state a claim upon which  
11 relief may be granted, or that seek monetary relief from a defendant who is immune from  
12 such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion  
13 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
14 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be  
15 granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

16  
17 **III. SUMMARY OF FIFTH AMENDED COMPLAINT**

18 Plaintiff names as Defendants (1) Slate, Psy.D., Edgefield FCI, (2) Mitchell, Psy.D.,  
19 Allenwood, USP, (3) Jaskowiak, Psy.D., Beaumont USP, (4) Schlak, Psy.D., Edgefield  
20 FCI, (5) Oliver, Psy.D., Atlanta USP, (6) Hauser, Psy.D., Atlanta USP, (7) Ray, Psy.D.,  
21 Victorville, USP, (8) Pacheco, Psy.D., Victorville USP, (9) Smith, Psy.D., Beaumont USP,  
22 (10) Grimm, Psy.D., Hazelton USP.<sup>2</sup> (Id.)

23  
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25 <sup>1</sup> Plaintiff's Second Amended Complaint and Third Amended Complaint were superseded prior to  
screening.

26 <sup>2</sup> The Fifth Amended Complaint lists in its caption, but not in Section III "Defendants": Crago,  
27 Psy.D., Atwater UPS; Kodger, Psy.D., Atwater USP; Fenche, Psy.D., Atwater USP; Kennedy, Psy.D.,

1 Plaintiff claims he suffers post-traumatic stress disorder (“PTSD”) as a result of  
2 traumatic events spanning some twenty years. He cites to a 2009 examination by a non-  
3 Federal Bureau of Prisons (“FBP”) criminal defense psychiatrist who, according to Plaintiff,  
4 found “chronic and psychotic” PTSD . (ECF 57 at § IV.)

5 Plaintiff told Defendants, mental health professionals at various FBP facilities, of  
6 the underlying traumatic events. Defendants deliberately and negligently failed to  
7 examine, diagnose and treat his resultant serious mental injuries which include  
8 flashbacks, nightmares, depression, sleeplessness, mood swings, amnesia, self-  
9 inflicting behavior, mental imbalance, suicidal thoughts, and impairment of mental  
10 functions.  
11

12 As relief, Plaintiff seeks money damages.

13  
14 **IV. ANALYSIS**

15 **A. Pleading Requirements Generally**

16 A complaint must contain “a short and plain statement of the claim showing that the  
17 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
18 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
19 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,  
20 1949 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A plaintiff must  
21 set forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its  
22 face.’ ” Id. Facial plausibility demands more than the mere possibility that a defendant  
23 committed misconduct and, while factual allegations are accepted as true, legal conclusions  
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27 Herlong FCI; Duncan, Psy.D., Atlanta USP; Pinnix-Hall, Psy.D., Atlanta USP; Fernandez, Ph.D., Atlanta USP.

1 are not. Id. at 1949–50.

2 Under Bivens, a plaintiff may sue a federal officer in his or her individual capacity for  
3 damages for violating the plaintiff's constitutional rights. See Bivens 403 U.S. at 397. To  
4 state a claim a plaintiff must allege: (1) that a right secured by the Constitution of the United  
5 States was violated, and (2) that the alleged violation was committed by a federal actor.<sup>3</sup>  
6

7 **B. Deliberate Indifference to Mental Health Needs**

8 1. Legal Standard

9 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an  
10 inmate must show ‘deliberate indifference to serious medical needs.’ ” Jett v. Penner, 439  
11 F.3d 1091, 1096 (9th Cir. 2006), quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976). The  
12 two prong test for deliberate indifference requires the plaintiff to show (1) “ ‘a serious  
13 medical need’ by demonstrating that ‘failure to treat a prisoner's condition could result in  
14 further significant injury or the unnecessary and wanton infliction of pain,’ ” and (2) “the  
15 defendant's response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096,  
16 quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992).  
17

18 Deliberate indifference is shown by “a purposeful act or failure to respond to a  
19 prisoner's pain or possible medical need, and harm caused by the indifference.” Jett, 439  
20 F.3d at 1096, citing McGuckin, 974 F.2d at 1060. In order to state a claim for violation of the  
21 Eighth Amendment, a plaintiff must allege sufficient facts to support a claim that the named  
22 defendants “[knew] of and disregard[ed] an excessive risk to [plaintiff's] health . . . .” Farmer  
23 v. Brennan, 511 U.S. 825, 837 (1994).  
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25  
26 <sup>3</sup> Bivens actions and actions under 42 U.S.C. § 1983 are identical save for replacement of state  
27 actor under § 1983 by federal actor under Bivens. Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991).

1 This principle extends to an inmate's mental-health-care needs. Smith v. Jenkins,  
2 919 F.2d 90, 92-93 (8th Cir. 1990). Deliberate indifference by prison personnel to an  
3 inmate's serious mental-health-care-needs violates the inmate's Eighth Amendment right  
4 to be free from cruel and unusual punishment. Id.

5 2. No Serious Mental Health Care Need

6 Plaintiff reiterates without augmentation the allegations previously found insufficient  
7 to claim a serious mental health care need. See McGuckin, 947 F.2d at 1059–60 (“[T]he  
8 existence of an injury that a reasonable doctor or patient would find important and worthy  
9 of comment or treatment; the presence of a medical condition that significantly affects an  
10 individual's daily activities; or the existence of chronic and substantial pain are examples  
11 of indications that a prisoner has a 'serious' need for medical treatment.”).

12 The forensic criminal defense opinion of Dr. Howsepian (ECF No. 57 at 7-15) does  
13 not appear to diagnose Plaintiff with such a serious mental disorder. Dr. Howsepian, a non-  
14 treating psychiatrist who evaluated Plaintiff solely to form a criminal defense diagnostic  
15 impression, suggests a chronic post traumatic stress disorder with schizotypal and antisocial  
16 traits and paranoia (ECF No. 57 at 9-12), presenting some danger of Plaintiff hurting himself  
17 or others should he transition from isolation to the general population. Id. at 13-15. Dr.  
18 Howsepian does not appear to diagnose a psychosis.<sup>4</sup>

19 Dr. Howsepian noted his cognitive examination of Plaintiff was “unremarkable, that  
20 Plaintiff was “alert, attentive, oriented in all four spheres” (Id. at 9), and “denying suicidal or  
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25 <sup>4</sup> Psychosis is a serious mental disorder characterized by defective or lost contact with reality,  
26 often with hallucinations or delusions. Merriam-Webster Online Dictionary, [http://www.merriam-](http://www.merriam-webster.com/dictionary/psychosis)  
27 [webster.com/dictionary/psychosis](http://www.merriam-webster.com/dictionary/psychosis); see also American Psychiatric Association (1994) Diagnostic and  
Statistical Manual of Mental Disorders : DSM-IV- TR § 3 (4th ed. 2000).

1 homicidal ideation, delusions, and hallucinations.” Id. Though Plaintiff reported to Dr.  
2 Howsepien severe trouble concentrating and extreme hyper vigilance, Id., the nature,  
3 frequency, severity, of such symptoms and how they impact Plaintiff is unstated. Dr.  
4 Howsepien does not describe any attendant history or findings suggesting the existence of  
5 a serious mental impairment.

6 Plaintiff fails to allege facts suggesting clinically significant distress or impairment of  
7 major domains of life.<sup>5</sup> Cf., U.S. v. Kidder, 869 F.2d 1328, 1331, n.2 (9th Cir. 1989)  
8 (affidavit from psychiatrist that inmate suffers from post traumatic stress disorder and a  
9 showing of serious impairment of ability to function or serious threat to himself sufficient to  
10 show a serious mental disorder).

11  
12 Neither Dr. Howsepien’s forensic impression or anything else before the Court is  
13 sufficient to enable the Court to conclude that Plaintiff experiences symptoms of mental  
14 impairment limiting his ability to function in his major daily activities or whether Plaintiff  
15 requires prescribed treatment. The facts before the Court do not suggest a definitive mental  
16 health diagnosis or treatment mandate by a treating physician or any obvious mental  
17 condition requiring treatment.<sup>6</sup>

18  
19 Plaintiff has no history of psychiatric hospitalizations, suicide attempts,  
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22 <sup>5</sup> Post Traumatic Stress Disorder is a psychological reaction that occurs after experiencing a  
23 highly stressing event that is usually characterized by depression, anxiety, flashbacks, recurrent  
24 nightmares, and avoidance of reminders of the event. Merriam-Webster Online Dictionary,  
<http://www.merriam-webster.com/dictionary/post> traumatic stress disorder; see also American Psychiatric  
25 Association (1994) Diagnostic and Statistical Manual of Mental Disorders : DSM-IV- TR § 3 (4th ed. 2000).

26 <sup>6</sup> “Serious medical needs” encompass conditions that are life-threatening or that carry risks of  
27 permanent serious impairment if left untreated, those that result in needless pain and suffering when  
treatment is withheld and those that have been diagnosed by a physician as mandating treatment. Scarver  
v. Litscher, 371 F.Supp.2d 986, 999 (W.D. Wis. 2005), citing Gutierrez v. Peters, 111 F.3d 1364, 1369  
(7th Cir. 1997).

1 psychotherapeutic treatments, or treatments with psychotropic medications. (ECF No. 57  
2 at 7-15.) His bare and broad allegations of unquantified flashbacks, nightmares,  
3 depression, sleeplessness, mood swings, amnesia, self-inflicting behavior, mental  
4 imbalance, suicidal thoughts, and unspecified impairment of mental functions are not  
5 alone sufficient to suggest a serious need for mental health care. His allegation that he  
6 suffers from “psychotic conditions” appears to be speculative and based upon his own  
7 conjecture.  
8

9 Plaintiff fails to allege facts suggesting a serious mental health care need impacting  
10 his daily prison activities.

11 3. No Deliberate Indifference

12 Even if Plaintiff had sufficiently alleged a serious mental health care need, he again  
13 fails to allege facts suggesting Defendants were deliberately indifferent to such need or  
14 acted in any medically unacceptable manner. The Fifth Amended Complaint suggests the  
15 opposite, i.e., that Plaintiff received ongoing access to mental health care by Defendants.  
16 See King v. Frank, 371 F.Supp.2d 977, 985 (W.D. Wis. 2005) (no deliberate indifference  
17 where undisputed that plaintiff received regular mental health treatment). Mere negligent  
18 failure to diagnose or treat a condition fails to state valid claim under the Eighth  
19 Amendment. Givens v. Jones, 900 F.2d 1229, 1231 (8th Cir. 1990).  
20

21 Significantly, Plaintiff fails to show the care recommended by Dr. Howsepian, as  
22 being in Plaintiff’s “best interest” reflects the only constitutionally acceptable treatment.  
23 Kidder, 869 F.2d at 1331. Plaintiff does not otherwise state how and why the care and  
24 treatment provided by Defendants was deficient and what care and treatment should have  
25 been provided.  
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27

1 Nothing suggests a difference of opinion among the treating health care  
2 professionals or that Plaintiff's treatment fell below that which is medically acceptable.  
3 See *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (difference of opinion not  
4 actionable unless chosen treatment medically unacceptable).

5 Plaintiff is not entitled to preventative therapy based solely on the threat of  
6 psychological deterioration. *Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983). The  
7 Eighth Amendment does not require that prisoners receive "unqualified access to health  
8 care." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

10 Plaintiff fails to state deliberate indifference by Defendants.

11 **C. No Federal Tort Claims Act Negligence**

12 1. Legal Standard

13 The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680, waives the  
14 sovereign immunity of the United States for certain torts committed by federal employees.  
15 *FDIC v. Meyer*, 510 U.S. 471, 477 (1994). The FTCA provides that district courts have  
16 exclusive jurisdiction of civil actions against the United States for money damages "for injury  
17 or loss of property, or personal injury or death caused by the negligent or wrongful act or  
18 omission of any employee" of the federal government while acting within the scope of his  
19 office or employment. 28 U.S.C. § 1346(b). The FTCA allows federal inmates to sue the  
20 United States for injuries sustained while incarcerated. 28 U.S.C. § 2674.

23 "The FTCA is a limited waiver of sovereign immunity, authorizing suit against the  
24 United States for tortious performance of governmental functions in limited cases," *Bibeau*  
25 *v. Pacific Northwest Research Foundation, Inc.*, 339 F.3d 942, 945 (9th Cir. 2003), and the  
26  
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1 waiver “is strictly construed in favor of the sovereign . . . .” FDIC v. Craft, 157 F.3d 697, 707  
2 (9th Cir. 1998).

3 2. No Proper Defendant Named

4 The United States is the only proper defendant in a suit brought pursuant to the  
5 FTCA. Craft, 157 F.3d at 706; Kennedy v. United States Postal Serv., 145 F.3d 1077, 1078  
6 (9th Cir. 1998). “A claim against [a federal agency] in its own name is not a claim against  
7 the United States.” Kennedy, 145 F.3d at 1078. Nor is an agency a proper defendant under  
8 the FTCA. Craft, 157 F.3d at 706, citing Shelton v. United States Customs Serv., 565 F.2d  
9 1140, 1141 (9th Cir. 1977).

10  
11 The Fifth Amended Complaint does not name the United States as a defendant.

12 3. No Claim Presentation

13  
14 Under the FTCA a claim must be filed with the appropriate federal agency within two  
15 years of its accrual and suit must be commenced within six months of the agency's denial  
16 of the claim.<sup>7</sup> 28 U.S.C. § 2401(b). This administrative exhaustion requirement is mandatory  
17 and jurisdictional. McNeil v. United States, 508 U.S. 106, 113 (1993) (“The FTCA bars  
18 claimants from bringing suit in federal court until they have exhausted their administrative  
19 remedies.”). Exhaustion must be affirmatively alleged in the Complaint. Bettis v. Blackstone,  
20 2009 WL 2971364, \*2 at n.2 (E.D. Cal. Sept.11, 2009), citing Gillespie v. Civiletti, 629 F.2d  
21 637, 640 (9th Cir. 1980).

22  
23 Plaintiff bears the burden of establishing jurisdiction under the FTCA. Industrial  
24 Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990). This Court lacks

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27 <sup>7</sup> The agency denial requirement is satisfied when the claim is actually denied or six months have passed without a final resolution having been made. 28 U.S.C. § 2675(a).

1 jurisdiction over such claims unless Plaintiff specifically alleges compliance with the FTCA's  
2 administrative exhaustion requirement. See Gillespie, 629 F.2d at 640 (“The timely filing of  
3 an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the  
4 FTCA, and, as such, should be affirmatively alleged in the complaint.”). A district court may  
5 dismiss a complaint for failure to allege this jurisdictional prerequisite. Id.

6  
7 Plaintiff fails to allege sufficient facts to enable the Court to determine he has timely  
8 exhausted his federal administrative remedies. He claims the administrative remedy  
9 process is complete and explains he received “no response.” (ECF No. 57 at § II.) However  
10 he fails to allege when he presented his FTCA claim, the basis for the claim, and agency  
11 to which he presented the claim.

12 Plaintiff was previously advised that neither his inmate grievances with the Fresno  
13 County Jail (ECF No. 57 at 4-6), nor the 2009 forensic opinion of Dr. Howsepien is sufficient  
14 to satisfy the federal exhaustion requirement with respect to his FTCA claim.

15  
16 The Fifth Amended Complaint fails to allege facts sufficient to suggest exhaustion  
17 of FTCA claim presentation requirements.

18 4. No FTCA Negligence

19 The Federal Tort Claims Act (FTCA) provides that:

20  
21 [T]he district courts . . . shall have exclusive jurisdiction of  
22 civil actions on claims against the United States, for money  
23 damages . . . for injury or loss of property, or personal injury  
24 or death caused by the negligent or wrongful act or omission  
25 of any employee of the Government while acting within the  
26 scope of his office or employment, under circumstances  
27 where the United States, if a private person, would be liable  
to the claimant in accordance with the law of the place where  
the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA also provides that the United States shall be liable for tort

1 claims “in the same manner and to the same extent as a private individual under like  
2 circumstances.” 28 U.S.C. § 2674. The FTCA contains a limited waiver of sovereign  
3 immunity, making the federal government liable for certain torts of federal employees acting  
4 within the scope of their employment. United States v. Orleans, 425 U.S. 807, 814 (1976).

5 The FTCA includes officers and employees of “any federal agency” but expressly  
6 excludes “any contractor with the United States.” 28 U.S.C. § 2671. The “critical test for  
7 distinguishing an agent from a contractor is the existence of federal authority to control and  
8 supervise the detailed physical performance and day to day operations of the contractor.”  
9 Carrillo v. United States, 5 F.3d 1302, 1304 (9th Cir. 1993); Orleans, 425 U.S. at 814-15.

10 Plaintiff fails to allege facts sufficient to suggest negligence in accordance with the  
11 laws of the places where the acts or omissions may have occurred. He names Defendants  
12 from various federal prison facilities in various states, but still fails to identify where and  
13 when the alleged negligence by Defendants took place. The Court lacks information  
14 sufficient to analyze state tort liability under the FTCA.  
15

16 Plaintiff does not allege facts suggesting Defendants were acting as officers or  
17 employees of any federal agency.  
18

19 In summary, Plaintiff fails to allege facts of claim presentation and liability  
20 sufficient for a cognizable negligence claim under the FTCA.  
21

22 **D. No Relief for Merely Mental Injury**

23 The Prison Litigation Reform Act provides that “[n]o Federal civil action may be  
24 brought by a prisoner confined in jail, prison, or other correctional facility, for mental and  
25 emotional injury suffered while in custody without a prior showing of physical injury.” 42  
26 U.S.C. § 1997e(e). The physical injury “need not be significant but must be more than de  
27

1 minimis.” See Oliver v. Keller, 289 F.3d 623, 627–29 (9th Cir. 2002) (allegations of severe  
2 and lasting back and leg pain, a painful canker sore, and unspecified injuries sustained in  
3 a fight not more than de minimis).

4 Plaintiff claims solely a mental injury. He fails to allege facts complying with the  
5 physical injury requirement.

6 **V. CONCLUSIONS AND ORDER**

7  
8 Plaintiff’s Fifth Amended Complaint does not state a claim for relief under Bivens or  
9 the FTCA. Plaintiff has repeatedly been advised in screening orders of the deficiencies in  
10 his claims and the required corrections, and having been afforded opportunities to correct  
11 has failed to do so.

12 The Court sees no useful purposes in allowing further amendment. Further leave to amend  
13 shall be denied.

14  
15 Based on the foregoing, it is **HEREBY ORDERED** that:

- 16 1. Plaintiff’s Fifth Amended Complaint (ECF No. 57) is DISMISSED for failure  
17 to state a claim, further amendment would be futile and is denied;
- 18 2. This action is DISMISSED WITH PREJUDICE for failure to state a claim,  
19 dismissal shall count as a strike pursuant to 28 U.S.C. § 1915(g); *Silva v.*  
20 *Di Vittoria*, 658 F.3d at 1009, 1098 (9th Cir. 2011); and  
21 3. Any and all pending motions shall be terminated and the Clerk of the Court  
22 shall CLOSE this case.  
23

24 IT IS SO ORDERED.

25  
26 Dated: May 31, 2013

27  
Is/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE