



1 A complaint must contain “a short and plain statement of the claim showing that the pleader is  
2 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
4 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing Bell  
5 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). While a plaintiff’s  
6 allegations are taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v.  
7 Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9<sup>th</sup> Cir. 2009) (internal quotation marks and citation  
8 omitted).

9 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally  
10 construed and to have any doubt resolved in their favor. Hebbe v. Pliler, 627 F.3d 338, 342 (9<sup>th</sup> Cir.  
11 2010) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible, which  
12 requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is  
13 liable for the misconduct alleged, Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks omitted);  
14 Moss v. United States Secret Serv., 572 F.3d 962, 969 (9<sup>th</sup> Cir. 2009). The sheer possibility that a  
15 defendant acted unlawfully is not sufficient, and mere consistency with liability falls short of  
16 satisfying the plausibility standard. Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 (quotation marks  
17 omitted); Moss, 572 F.3d at 969.

## 18 **II. Plaintiff’s Allegations**

19 Plaintiff is housed at the California Substance Abuse Treatment Facility in Corcoran,  
20 California. The events alleged in his complaint occurred while Plaintiff was housed at CDCR-  
21 Jamestown. Plaintiff names Correctional Lieutenant Cervantes and CDCR-Jamestown as defendants.

22 Plaintiff alleges as follows:

23 In this case, the SHO inappropriately entered a plea of “Guilty” based on the inmate  
24 (Randy Sheehan) not entering a plea. Furthermore in the Findings Section it is noted,  
25 “The above referenced report and Sheehan’s plea and statement” the TLR notes that the  
26 appellant did not plea and did not make a statement. The TLR finds the aforementioned  
27 statement to be a due process violation because the “Guilty” plea was used as evidence  
28 against the appellant in the hearing to determine guilt. The crime of violating my due  
process right was committed by Lt. Cervantes.

(ECF No. 1, p. 3.)

1 Plaintiff seeks damages, along with declaratory and injunctive relief.

2 **III. Discussion**

3 Plaintiff's complaint is cursory and difficult to understand. However, Plaintiff's complaint  
4 references a "TLR," which is attached to his complaint. The attached document is entitled "Third  
5 Level Appeal Decision" dated September 11, 2002. It includes findings at the "Third Level of Review  
6 (TLR)" related to an appeal filed by Plaintiff regarding a Rules Violation Report. (ECF No. 1, p. 5.)

7 According to the document, Plaintiff submitted an appeal related to CDC Form 115, Rules  
8 Violation Report (RVR), Log #11-11-B-15, dated November 11, 2011, for Possession of an Inmate  
9 Manufactured Syringe. Plaintiff claimed that he did not plead "guilty" and requested that the RVR be  
10 dismissed in part due to a due process violation. At the Third Level of Review, the appeals examiner  
11 found good cause to modify the findings of the RVR and partially granted Plaintiff's appeal. The  
12 TLR's findings mirror the statements in Plaintiff's complaint and read as follows:

13 In this case, the SHO inappropriately entered a plea of "guilty" based on the inmate not  
14 entering a plea. Furthermore, in the findings section it is noted, "The above referenced  
15 report and Sheehan's plea and statement . . ." The TLR notes that the appellant did not  
16 plea and did not make a statement. The TLR finds the aforementioned statement to be a  
17 due process violation because the "guilty" plea was used as evidence against the  
18 appellant in the hearing to determine guilt. Based upon the aforementioned due process  
19 error, the TLR finds good cause to intervene.

20 (ECF No. 1, p. 5.) Based on the findings, the Sierra Conservation Center was ordered to reissue and  
21 rehear the RVR Log#11-15-B-15, dated November 11, 2011, properly addressing the appellant's plea  
22 and statement.

23 Plaintiff has not stated a cognizable section 1983 due process claim. Plaintiff's complaints  
24 about the due process violations found at the TLR are moot because Plaintiff was granted a second  
25 hearing at the TLR after he submitted his appeal. See Harper v. Lee, 938 F.2d 104, 105 (8th Cir.  
26 1991) (section 1983 action holding prisoner was not denied due process because he was granted  
27 rehearing); Batanic v. Immigration and Naturalization Serv., 12 F.3d 662, 667 (7th Cir. 1993)  
28 ("Generally speaking, procedural errors are cured by holding a new hearing in compliance with due  
process requirements."); Coleman v. Palacios, 2009 WL 2985042, \*6 (C.D. Cal. 2009) (section 1983

1 due process claim subject to dismissal because error was cured in the administrative appeal process).  
2 This deficiency cannot be cured by amendment.

3 **IV. Conclusion and Recommendation**

4 Based on the above, it is HEREBY RECOMMENDED that this action be DISMISSED based  
5 on Plaintiff's failure to state a cognizable section 1983 due process claim.

6 These Findings and Recommendations will be submitted to the United States District Judge  
7 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty-one (21)**  
8 **days** after being served with these Findings and Recommendations, Plaintiff may file written  
9 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
10 Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified  
11 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th  
12 Cir. 1991).

13  
14 IT IS SO ORDERED.

15 Dated: December 4, 2013

/s/ Barbara A. McAuliffe  
16 UNITED STATES MAGISTRATE JUDGE