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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 JOSE SANTIAGO,

11 Plaintiff,

12 vs.

13 V. PATEL, et al.,

14 Defendants.  
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1:13-cv-00032-GSA-PC

ORDER DISMISSING CASE, WITH  
PREJUDICE, FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF MAY BE  
GRANTED UNDER SECTION 1983  
(Doc. 17.)

ORDER THAT THIS DISMISSAL IS  
SUBJECT TO THE "THREE-STRIKES"  
PROVISION SET FORTH IN 28 U.S.C. §  
1915(g)

ORDER FOR CLERK TO CLOSE THIS  
CASE

20 **I. BACKGROUND**

21 Jose Santiago ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis  
22 with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint  
23 commencing this action on January 9, 2013. (Doc. 1.)

24 On January 22, 2013, Plaintiff consented to Magistrate Judge jurisdiction pursuant to 28  
25 U.S.C. § 636(c) in this action, and no other parties have made an appearance. (Doc. 6.)  
26 Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of  
27 California, the undersigned shall conduct any and all proceedings in the case until such time as  
28 reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

1 On March 11, 2013, Plaintiff filed the First Amended Complaint. (Doc. 13.) On  
2 September 16, 2013, the Court dismissed the First Amended Complaint for failure to state a  
3 claim, with leave to amend. (Doc. 16.) On September 25, 2013, Plaintiff filed the Second  
4 Amended Complaint, which is now before the court for screening. (Doc. 17.)

## 5 **II. SCREENING REQUIREMENT**

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

14 A complaint is required to contain “a short and plain statement of the claim showing  
15 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
16 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
17 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,  
18 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955  
19 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge  
20 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)  
21 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual  
22 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.  
23 at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

24 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to  
25 state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572  
26 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this  
27 plausibility standard. Id.

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1 **III. SUMMARY OF SECOND AMENDED COMPLAINT**

2 Plaintiff is a state prisoner in the custody of the California Department of Corrections  
3 and Rehabilitation (CDCR), incarcerated at Wasco State Prison (WSP) in Wasco, California,  
4 where the events at issue in the Second Amended Complaint allegedly occurred. Plaintiff  
5 names as the sole defendant Dr. V. Patel (“Defendant”). Defendant was an employee of the  
6 CDCR at WSP at the time of the events at issue. Plaintiff’s factual allegations follow.

7 Plaintiff has a serious, permanent medical condition due to a colostomy. On December  
8 7, 2011, Plaintiff arrived at WSP with 80 colostomy bags from his last institution. On  
9 December 19, 2011, Plaintiff saw Dr. Ramos who fully granted a 602 inmate grievance that  
10 Plaintiff had pending. As Plaintiff walked out, LVN Dickerson approached Dr. Ramos. The  
11 next day, Plaintiff’s order for colostomy bags was changed and a new doctor, Dr. V. Patel,  
12 arrived. Dr. Patel refused to approve Plaintiff’s order for colostomy bags. Plaintiff kept  
13 explaining that he has had a colostomy for 12 years and has daily needs for colostomy bags, but  
14 Dr. Patel refused to understand and told Plaintiff he was delusional. Dr. Patel was very  
15 inconsiderate and disrespectful to Plaintiff, kept comparing Plaintiff to inmates at the  
16 Correctional Training Facility, and told Plaintiff he thought his condition could be fixed.  
17 Plaintiff told Dr. Patel that he has seen other doctors who verified that his condition is  
18 permanent. Dr. Patel refused to listen, and Plaintiff had to beg for bags every other day. His  
19 80 bags ran out. In April 2011, Plaintiff was in need of bags and was kicked out of the medical  
20 department by LVN Dickenson and disciplined. From that time, Plaintiff used trash bags  
21 instead of colostomy bags.

22 Plaintiff requests monetary damages to compensate him for three years of humiliation.  
23 Plaintiff also requests a court order to provide him with 60 colostomy bags and karaya rings  
24 each month.

25 Plaintiff informs the court in the Second Amended Complaint that a new doctor has  
26 resolved Plaintiff’s need for colostomy bags, and since April 2013, Plaintiff now receives 30  
27 colostomy bags per month.

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1 **IV. PLAINTIFF'S MEDICAL CLAIM**

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

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

9 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal  
10 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)  
11 (internal quotations omitted). "To the extent that the violation of a state law amounts to the  
12 deprivation of a state-created interest that reaches beyond that guaranteed by the federal  
13 Constitution, Section 1983 offers no redress." Id.

14 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an  
15 inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d  
16 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976)).  
17 The two-part test for deliberate indifference requires the plaintiff to show (1) "a serious  
18 medical need' by demonstrating that 'failure to treat a prisoner's condition could result in  
19 further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the  
20 defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting  
21 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX  
22 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations  
23 omitted)). Deliberate indifference is shown by "a purposeful act or failure to respond to a  
24 prisoner's pain or possible medical need, and harm caused by the indifference." Id. (citing  
25 McGuckin, 974 F.2d at 1060). Deliberate indifference may be manifested "when prison  
26 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by  
27 the way in which prison physicians provide medical care." Id. Where a prisoner is alleging a  
28 delay in receiving medical treatment, the delay must have led to further harm in order for the  
prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at

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1 1060 (citing Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.  
2 1985)).

3 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,  
4 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the  
5 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but  
6 that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S.  
7 825, 837, 114 S.Ct. 1970 (1994)). “If a prison official should have been aware of the risk, but  
8 was not, then the official has not violated the Eighth Amendment, no matter how severe the  
9 risk.” Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir.  
10 2002)). “A showing of medical malpractice or negligence is insufficient to establish a  
11 constitutional deprivation under the Eighth Amendment. Id. at 1060. “[E]ven gross negligence  
12 is insufficient to establish a constitutional violation.” Id. (citing Wood v. Housewright, 900  
13 F.2d 1332, 1334 (9th Cir. 1990)).

14 Plaintiff’s need for colostomy bags does not rise to the level of “a serious medical  
15 need,” because he does not make a showing that the failure to provide him with colostomy bags  
16 “could result in further significant injury or the unnecessary and wanton infliction of pain.”  
17 Jett, 439 F.3d at 1096. Plaintiff describes humiliation, but not pain or injury from being denied  
18 colostomy bags for three years.<sup>1</sup> Furthermore, Plaintiff fails to allege facts showing that Dr.  
19 Patel was deliberately indifferent to his needs. Plaintiff fails to show that when Dr. Patel acted  
20 against him, or failed to act, he knew of a substantial risk of serious harm to Plaintiff and  
21 deliberately disregarded the risk. Therefore, Plaintiff fails to state a medical claim under the  
22 Eighth Amendment.

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26 <sup>1</sup> The Prison Litigation Reform Act provides that “[n]o Federal civil action may be brought by a prisoner  
27 confined in jail, prison, or other correctional facility, for mental and emotional injury suffered while in custody  
28 without a prior showing of physical injury.” 42 U.S.C. § 1997e(e). The physical injury “need not be significant  
but must be more than *de minimis*.” Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002). The physical injury  
requirement applies only to claims for mental or emotional injuries and does not bar claims for compensatory,  
nominal, or punitive damages. Id. at 630.

1 **V. CONCLUSION AND ORDER**

2 The Court finds that Plaintiff's Second Amended Complaint fails to state any cognizable  
3 claims upon which relief may be granted under § 1983. In this action, the Court previously  
4 granted Plaintiff an opportunity to amend the complaint, with ample guidance by the Court.  
5 Plaintiff has now filed two amended complaints without alleging facts against any of the  
6 defendants which state a claim under § 1983. The Court finds that the deficiencies outlined  
7 above are not capable of being cured by amendment, and therefore further leave to amend  
8 should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127  
9 (9th Cir. 2000).

10 Therefore, **IT IS HEREBY ORDERED** that:

- 11 1. Pursuant to 28 U.S.C. § 1915A and 28 U.S.C. § 1915(e), this action is  
12 DISMISSED with prejudice for failure to state a claim upon which relief may be  
13 granted under § 1983;
- 14 2. This dismissal is subject to the "three-strikes" provision set forth in 28 U.S.C. §  
15 1915(g); Silva v. Vittorio, 658 F.3d 1090, 1098 (9th Cir. 2011); and
- 16 3. The Clerk is directed to close this case.

17  
18 IT IS SO ORDERED.

19 Dated: May 8, 2014

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE