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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 ANDREW CALVIN COLEY,

12 Plaintiff,

13 v.

14 BRIAN DUFFY, et al.,

15 Defendants.  
16

Case No. 1:13-cv-00912-BAM-PC

ORDER DISMISSING THIS ACTION FOR  
FAILURE TO STATE A COGNIZABLE  
CLAIM FOR RELIEF

ORDER THAT THIS ACTION COUNT AS  
A STRIKE PURSUANT TO 28 U.S.C. §  
1915(g)

17 Plaintiff is a state prisoner proceeding pro se and in forma pauperis pursuant to 42 U.S.C.  
18 § 1983. Plaintiff has consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c).<sup>1</sup>  
19 Currently before the Court is Plaintiff's June 16, 2016, second amended complaint (ECF No. 46.)  
20

21 **I.**

22 **SCREENING REQUIREMENT**

23 The Court is required to screen complaints brought by prisoners seeking relief against a  
24 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
25 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
26 legally "frivolous or malicious," that "fail to state a claim on which relief may be granted," or

27 <sup>1</sup> Plaintiff filed a consent to proceed before a magistrate judge on June 17, 2013. (ECF No. 7.) On July 1, 2013,  
28 Plaintiff filed a decline of magistrate judge jurisdiction. (ECF No. 8.) Plaintiff may not withdraw his consent once  
it has been filed. 28 U.S.C. § 636(c)(4); Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993)(stating that "[t]here is no  
absolute right, in a civil case, to withdraw consent to trial and other proceedings before a magistrate judge.").

1 that “seek monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §  
2 1915(e)(2)(B).

3 A complaint must contain “a short and plain statement of the claim showing that the  
4 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
5 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
6 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(citing Bell  
7 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate  
8 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.  
9 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

10 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings  
11 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d  
12 1113, 1121 (9th Cir. 2012)(citations omitted). To survive screening, Plaintiff’s claims must be  
13 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer  
14 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss  
15 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant  
16 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s  
17 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572  
18 F.3d at 969.

## 19 II.

### 20 PROCEDURAL HISTORY

21 This action proceeds on the June 16, 2016, second amended complaint, filed in response  
22 to the April 5, 2016, order dismissing claims in the first amended complaint and granting  
23 Plaintiff leave to file an amended complaint. (ECF No. 43.) In the April 5, 2016, order, the  
24 Court dismissed Plaintiff’s failure to protect and retaliation claims, and Plaintiff’s claims  
25 regarding his disciplinary conviction and grievance process for failure to state a claim upon  
26 which relief could be granted without leave to amend. Plaintiff was granted leave to file a  
27 second amended complaint as to his equal protection claim only.

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2 **III.**

3 **COMPLAINT ALLEGATIONS**

4 Plaintiff, an inmate in the custody of the California Department of Corrections and  
5 Rehabilitation (CDCR) the R. J. Donovan Correctional Facility in San Diego, brings this action  
6 against correctional officials employed by the CDCR at Pleasant Valley State Prison (PVSP),  
7 where the events at issue occurred. Plaintiff names as Defendants the following individuals:  
8 Warden Brian Duffy; Correctional Officer (C/O) F. Martinez; C/O Delacruz; C/O W. Tucker;  
9 Sergeant M. Santa; Sergeant Redding.

10 Plaintiff's allegations relate to his mental health treatment. Plaintiff is an outpatient in  
11 the Correctional Clinical Case Management System (CCCMS). Plaintiff alleges that when he  
12 arrived at PVSP on January 13, 2012, he was placed on suicide watch. On June 22, 2012,  
13 Plaintiff asked Defendant Martinez to "call the psychology" because he was thinking about  
14 hurting himself. (ECF No. 46, p. 4.) Despite Plaintiff's explanation that he is a CCCMS  
15 inmate, Defendant Martinez refused to call for help. Plaintiff also asked Defendant Delacruz to  
16 call for help, which he refused to do. Plaintiff alleges that Defendant Martinez told Defendant  
17 Delacruz not to call for help. Plaintiff also asked Defendant Tucker to call for help. Defendant  
18 Tucker refused to call for help. The balance of Plaintiff's complaint re-states the allegations  
19 regarding Plaintiff's claims regarding his inmate grievance and disciplinary conviction.

20 **IV.**

21 **DISCUSSION**

22 **A. Equal Protection**

23 The Equal Protection Clause requires that persons who are similarly situated be treated  
24 alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Hartmann v.  
25 CDCR, 707 F.3d 1114, 1123 (9th Cir. 2013); Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir.  
26 2013); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). To state a claim, Plaintiff must  
27 show that Defendants intentionally discriminated against him based on his membership in a  
28 protected class. Hartmann, 707 F.3d at 1123; Furnace, 705 F.3d at 1030; Serrano v. Francis, 345

1 F.3d 1071, 1082 (9th Cir. 2003); Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001).

2 In the order dismissing this claim with leave to amend, the Court noted that Plaintiff had  
3 not alleged that he suffered the deprivation of a protected interest. (ECF No. 43 at 11:24.) In  
4 order to state a claim for relief, Plaintiff must allege facts indicating that Defendants engaged in  
5 some conduct that indicates discrimination based upon Plaintiff's ethnicity, or that similarly  
6 situated inmates were treated differently without a rational relationship to a legitimate state  
7 purpose. Enquist v. Oregon Department of Agriculture, 553 U.S. 591, 602-02 (2008); Village of  
8 Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580,  
9 592 (9th Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 489 (9th Cir. 2008).

10 Plaintiff concludes that Defendants are liable because they did call for help for other  
11 CCCMS inmates when requested. That Defendants summoned help for other CCCMS inmates  
12 and not for Plaintiff does not, of itself, constitute a violation of the Equal Protection Clause.  
13 Plaintiff fails to allege any facts indicating that any of the Defendants treated similarly situated  
14 inmates differently without a rational relationship to a legitimate state purpose, or that any of the  
15 Defendants intentionally discriminated against him based on his ethnicity. This claim should  
16 therefore be dismissed. Plaintiff's allegations as to the remaining Defendants relate to the claims  
17 that were dismissed in the April 5, 2016, order.

18 V.

19 **CONCLUSION AND ORDER**

20 Plaintiff was previously notified of the applicable legal standard and the deficiencies in  
21 his pleading, and despite guidance from the Court, Plaintiff's second amended complaint is  
22 largely identical to the first amended original complaint. Based upon the allegations in  
23 Plaintiff's first amended complaint and second amended complaint, the Court is persuaded that  
24 Plaintiff is unable to allege any additional facts that would support a claim for discrimination in  
25 violation of the Equal Protection Clause, and further amendment would be futile. See Hartmann  
26 v. CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013) ("A district court may deny leave to amend when  
27 amendment would be futile.") Based on the nature of the deficiencies at issue, the Court finds  
28 that further leave to amend is not warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.

1 2000); Noll v. Carlson, 809 F.2d 1446-1449 (9<sup>th</sup> Cir. 1987).

2 Accordingly, IT IS HEREBY ORDERED that:

- 3 1. This action is dismissed for Plaintiff's failure to state a claim upon which relief could  
4 be granted;
- 5 2. This action counts as a strike pursuant to 28 U.S.C. § 1915(g); and
- 6 3. The Clerk is directed to close this case.

7  
8 IT IS SO ORDERED.

9 Dated: September 1, 2016

/s/ Barbara A. McAuliffe  
UNITED STATES MAGISTRATE JUDGE