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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MONTE WEATHERINGTON,
Plaintiff,
vs.
S. RIOS, et al.,
Defendants.

1:14-cv-00906-AWI-GSA-PC

SCREENING ORDER

ORDER DISMISSING SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM, WITH LEAVE TO AMEND

THIRTY-DAY DEADLINE FOR PLAINTIFF TO FILE A THIRD AMENDED COMPLAINT

ORDER FOR CLERK TO SEND PLAINTIFF A CIVIL COMPLAINT FORM

I. BACKGROUND

Monte Weatherington (“Plaintiff”) is a state prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on June 12, 2014. (ECF No. 1.) The court screened the Complaint under 28 U.S.C. § 1915A and issued an order on March 16, 2015, requiring Plaintiff to file an amended complaint or proceed with the cognizable Fourth Amendment claim found by the court. (ECF No. 7.) On June 1, 2015, Plaintiff filed the First Amended Complaint. (ECF No. 13.) On April 27, 2016,

1 the court dismissed the First Amended Complaint for failure to state a claim, with leave to
2 amend. (ECF No. 16.) On June 16, 2016, Plaintiff filed the Second Amended Complaint,
3 which is now before the court for screening. (ECF No. 18.)

4 **II. SCREENING REQUIREMENT**

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

13 A complaint is required to contain “a short and plain statement of the claim showing
14 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
15 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
16 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
17 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are
18 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
19 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
20 To state a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to
21 ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S.
22 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as
23 true, legal conclusions are not. Id. The mere possibility of misconduct falls short of meeting
24 this plausibility standard. Id.

25 **III. SUMMARY OF ALLEGATIONS IN SECOND AMENDED COMPLAINT**

26 Plaintiff is presently incarcerated at the California Men’s Colony-East in San Luis
27 Obispo, California. The events at issue in the Second Amended Complaint allegedly occurred
28 at Pleasant Valley State Prison (PVSP) in Coalinga, California, when Plaintiff was incarcerated

1 there.¹ Plaintiff names as defendants Correctional Officers (C/O) S. Rios and Arranquin
2 (“Defendants”). Plaintiff brings claims under the First, Fourth, Eighth, and Fourteenth
3 Amendments for retaliation, improper strip searches, excessive force, and violation of due
4 process. Plaintiff brings a substantive due process claim, characterizing the violations against
5 him as “shocking to the conscience.” Second Amended Complaint (2ACP) at 8. Plaintiff also
6 brings a claim for procedural due process. Plaintiff states that he has more evidence which the
7 court asked him not to include in the complaint.

8 Plaintiff alleges as follows. Defendant C/O Rios, a male officer, singled Plaintiff out,
9 made embarrassing comments about him to other officers, took Plaintiff out of view of other
10 officers, and performed multiple strip searches when he and Plaintiff were alone. Often, Rios
11 would have Plaintiff wait until last to be called for a search, so that no others would be present,
12 causing Plaintiff extreme anxiety. When other inmates were present, Rios would make
13 comments like, “You got to watch this one,” and in prison such comments can lead to violence.
14 2ACP at 7.

15 Defendant C/O Arranquin, a female officer, observed strip searches of Plaintiff and
16 other male inmates by monitor, and viewed inmates on the monitor when they went to the
17 bathroom. She particularly gawked at black inmates, as seen by other blacks when they
18 observed her from the visiting room. Plaintiff contends that defendants C/O Arranquin and
19 C/O Rios worked together, and C/O Rios condoned C/O Arranquin’s actions and encouraged
20 her to particularly watch Plaintiff.

21 Plaintiff was called out for an unreasonable search while he was with his wife in the
22 visiting room. Plaintiff and his wife were in line near the officer’s desk, waiting to take a
23 photograph. C/O Arranquin told Plaintiff, “Don’t do it.” 2ACP at 3. Plaintiff said, “Don’t do
24 what?” and then realized that Arranquin thought he was going to speak to an inmate behind the
25

26 ¹ In the Second Amended Complaint, Plaintiff does not indicate when or where the events at
27 issue took place. In the original Complaint, Plaintiff alleges that the events at issue took place at PVSP, when he
28 was incarcerated there. (ECF No. 1 at 5 ¶3.) However, none of Plaintiff’s complaints indicate when the events
took place. Plaintiff shall be required to include information about when and where the events took place in his
Third Amended Complaint.

1 glass. 2ACP at 3-4. C/O Rios called out to Plaintiff to search him, and when Plaintiff asked
2 what it was about, C/O Rios said, “It’s for fucking with my partner.” 2ACP at 4. C/O Rios
3 pulled Plaintiff out of the visiting room to humiliate him in front of other inmates, and exposed
4 Plaintiff’s genitals during the search to the female officer on the monitor. There was no
5 penological purpose for the search; it was only to get revenge against Plaintiff for prior
6 grievances that Plaintiff had filed against C/O Rios. Plaintiff alleges that C/O Rios performed
7 an excessive number of searches on Plaintiff on dates coinciding with Plaintiff’s filing of
8 grievances.

9 Five officers were called away from the yard to strip search Plaintiff, placing the
10 institution at risk because they were not able to immediately respond to an alarm in the medical
11 clinic. This was part of Officer Rios’ acts against Plaintiff for filing grievances against him.

12 Officer Rios also fondled Plaintiff’s genitals during a pat down search, to show Rios’
13 intention to exert power and control over Plaintiff. Rios also retaliated against him by having
14 him transferred to another yard. Plaintiff advises the court that a review of his 602 grievances
15 will show the dates, times, and nature of defendants Rios and Arranquin’s actions.²

16 Plaintiff has not included a request for relief in the Second Amended Complaint.

17 **IV. PLAINTIFF’S CLAIMS**

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

19 Every person who, under color of any statute, ordinance, regulation, custom, or
20 usage, of any State or Territory or the District of Columbia, subjects, or causes
21 to be subjected, any citizen of the United States or other person within the
22 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress

23 42 U.S.C. § 1983

24 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
25 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
26 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman

27
28 ² However, Plaintiff did not submit any 602 grievances with the Second Amended Complaint for
the court’s review.

1 v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697
2 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012);
3 Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of
4 a state law amounts to the deprivation of a state-created interest that reaches beyond that
5 guaranteed by the federal Constitution, Section 1983 offers no redress.” Id.

6 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
7 color of state law and (2) the defendant deprived him or her of rights secured by the
8 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
9 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
10 “under color of state law”). A person deprives another of a constitutional right, “within the
11 meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or
12 omits to perform an act which he is legally required to do that causes the deprivation of which
13 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
14 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
15 causal connection may be established when an official sets in motion a ‘series of acts by others
16 which the actor knows or reasonably should know would cause others to inflict’ constitutional
17 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
18 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
19 Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
20 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

21 **A. Deficiencies in Second Amended Complaint**

22 Plaintiff shall be required to file a Third Amended Complaint because of procedural
23 deficiencies in the Second Amended Complaint. First, the Second Amended Complaint does
24 not include a request for relief. Rule 8(a) of the Federal Rules of Civil Procedure requires that
25 “[a] pleading that states a claim for relief must contain . . . a demand for the relief sought,
26 which may include relief in the alternative or different types of relief.” Plaintiff’s Third
27 Amended Complaint must contain a request for the relief sought.

1 Second, the Second Amended Complaint is not signed under penalty of perjury.³ This
2 court's form complaint includes a signature line for the plaintiff to sign under penalty of
3 perjury. Plaintiff shall be required to use the court's form complaint for his Third Amended
4 Complaint.

5 Third, the Second Amended Complaint does not indicate when or where the events at
6 issue took place. This basic information is necessary for the court to determine venue and
7 when the claims accrued. Plaintiff must provide this information in the Third Amended
8 Complaint.

9 Due to these deficiencies, Plaintiff's Second Amended Complaint shall be dismissed for
10 failure to state a claim, with leave to amend. Notwithstanding this dismissal for procedural
11 deficiencies, the court shall proceed to screen the Second Amended Complaint and provide
12 Plaintiff with guidance as to his claims.

13 **B. Plaintiff's Statement That the Court Asked Him Not to Include Evidence**

14 Plaintiff states in the Second Amended Complaint that he "has evidence in furtherance
15 of this case which this court has asked they not be included in the complaint." (2ACP at 8.)
16 The court finds no evidence on the record that the court asked Plaintiff not to include any
17 evidence in the complaint. The court cannot address Plaintiff's assertion without more
18 information.

19 **C. Eighth Amendment Excessive Force**

20 "What is necessary to show sufficient harm for purposes of the Cruel and Unusual
21 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue"
22 Hudson v. McMillian, 503 U.S. 1, 8 (1992). "The objective component of an Eighth
23 Amendment claim is . . . contextual and responsive to contemporary standards of decency." Id.
24 (internal quotation marks and citations omitted). The malicious and sadistic use of force to
25 cause harm always violates contemporary standards of decency, regardless of whether or not
26

27 ³A verified complaint may be treated as an affidavit to the extent that the complaint is based on
28 personal knowledge and sets forth facts admissible in evidence and to which the affiant is competent to testify.
Lew v. Kona Hosp., 754 F.2d 1420, 1423 (9th Cir. 1985) (citing Runnels v. Rosendale, 499 F.2d 733, 734 n. 1
(9th Cir.1974)); see Thalheimer v. City of San Diego, 645 F.3d 1109, 1116 (9th Cir. 2011).

1 significant injury is evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir.
2 2002) (Eighth Amendment excessive force standard examines *de minimis* uses of force, not *de*
3 *minimis* injuries)). However, not “every malevolent touch by a prison guard gives rise to a
4 federal cause of action.” Id. at 9. “The Eighth Amendment’s prohibition of cruel and unusual
5 punishments necessarily excludes from constitutional recognition *de minimis* uses of physical
6 force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”
7 Id. at 9-10 (internal quotation marks and citations omitted).

8 “[W]henever prison officials stand accused of using excessive physical force in
9 violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether
10 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and
11 sadistically to cause harm.” Id. at 7. “In determining whether the use of force was wanton and
12 unnecessary, it may also be proper to evaluate the need for application of force, the relationship
13 between that need and the amount of force used, the threat reasonably perceived by the
14 responsible officials, and any efforts made to temper the severity of a forceful response.” Id.
15 (internal quotation marks and citations omitted). “The absence of serious injury is . . . relevant
16 to the Eighth Amendment inquiry, but does not end it.” Id.

17 Plaintiff alleges an Eighth Amendment claim against defendant C/O Rios for use of
18 excessive force during a pat down search. The court finds no facts in the Second Amended
19 Complaint which support a claim that defendant Rios used excessive physical force against him
20 during the course of a search. Therefore, Plaintiff fails to state a cognizable Eighth Amendment
21 claim against defendant Rios.

22 **D. Fourth Amendment Claims**

23 The Fourth Amendment guarantees the right of the people to be secure against
24 unreasonable searches, and its protections extend to incarcerated prisoners. Bell v. Wolfish,
25 441 U.S. 520, 545 (1979). In determining the reasonableness of a search under the Fourth
26 Amendment, “[c]ourts must consider the scope of the particular intrusion, the manner in which
27 it is conducted, the justification for initiating it, and the place in which it is conducted.” Id. at
28 559. The reasonableness of a prisoner search is determined by reference to the prison context.

1 Michenfelder v. Sumner, 860 F.2d 328, 332 (9th Cir.1988). “When a prison regulation
2 impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to
3 legitimate penological interests.” Turner v. Safley, 482 U.S. 78, 79, 107 S.Ct. 2254, 96
4 L.Ed.2d 64 (1987). The Supreme Court found reasonable “[v]isual body cavity searches
5 conducted after contact visits as a means of preventing prisoners’ possession of weapons and
6 contraband, even absent probable cause.” Id., 111 F.3d at 700 (quoting Michenfelder, 860
7 F.2d at 332). In Thompson v. Souza, 111 F.3d 694, 700 (9th Cir. 1997), the Ninth Circuit held
8 that visual strip searches and urine tests to search for drugs were reasonably related to the
9 prison officials’ legitimate penological interest in keeping drugs out of prison. However, “not
10 all strip search procedures will be reasonable; some could be excessive, vindictive, harassing,
11 or unrelated to any legitimate penological interest.” Id. The prisoner bears the burden of
12 showing that prison officials intentionally used exaggerated or excessive means to enforce
13 security in conducting a search. Id.

14 Here, Plaintiff alleges that defendant Rios conducted an excessive number of strip
15 searches on him, some of them when Plaintiff and Rios were alone. Plaintiff also alleges that
16 Rios fondled Plaintiff’s genitals during a pat down search “in a malicious and sadistic way.”
17 2ACP at 5. Plaintiff may be able to state a claim for violation of his Fourth Amendment rights
18 against defendant Rios for excessive strip searches and fondling of his genitals. Thus, these
19 claims are not appropriate for dismissal at the Rule 12(b)(6) stage. Hedrick v. McDaniel, 466
20 F.3d 676, 694 (9th Cir. 2006). “The watchword of the Fourth Amendment in every context is
21 reasonableness.” Id. “The ‘reasonableness’ of a search or seizure is a fact-intensive inquiry
22 that cannot be determined at this stage.” Id. (quoting Thompson v. Souza, 111 F.3d 694, (9th
23 Cir. 1997) (evaluating the reasonableness of a strip search based on the manner and scope of
24 the search, the place, and the justification)). “It is impossible to make such a fact-specific
25 determination when the precise circumstances of the searches . . . are not before the court and
26 when the Defendants have not yet had a chance to explain their justification for the alleged
27 searches . . .” Id.

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1 However, Plaintiff fails to state a claim for being pulled out of a contact visit with his
2 wife by defendant Rios to conduct a strip search. He claims there was no justification for the
3 search. Based on the facts alleged in the Second Amended Complaint, Plaintiff fails to present
4 a cognizable Fourth Amendment claim, without more, against defendant Rios for this strip
5 search. It is clear that prison officials have a legitimate penological interest in conducting a
6 strip search during or after a contact visit with someone from outside the prison. Such searches
7 are essential to the safety of the institution and inmates. Courts have long recognized that
8 contact visits result in challenges to institutional security and safety, and the unsupported
9 assertion that searches conducted in the context of visitation lack legitimate penological
10 justification is untenable. See Block v. Rutherford, 468 U.S. 576, 586, 104 S.Ct. 3227 (1984)
11 (contact visits invite a host of security problems by opening the institution to the introduction
12 of drugs, weapons, or other contraband); Bell, 441 U.S. at 558-59 (recognizing that smuggling
13 of money, drugs, weapons, and other contraband is “all too common an occurrence”).

14 Plaintiff also fails to state a Fourth Amendment claim against defendants Rios and
15 Arranquin for routinely watching Plaintiff and other inmates on a monitor during strip searches
16 or while the inmates used the bathroom. The facts as set forth in the Second Amended
17 Complaint are insufficient to establish a cognizable Fourth Amendment claim, even if
18 defendant Arranquin was seen gawking at black inmates.⁴ The mere fact that Plaintiff and
19 other inmates could be viewed while in the bathroom does not present a Fourth Amendment
20 violation. See Grummett v. Rushen, 779 F.2d 491, 495 (9th Cir. 1985) (guards’ surveillance of
21 the inmates in their cells, in the showers, and from the play yard did not violate the Fourth
22 Amendment). The fact that C/O Arranquin was of the opposite sex does not alter the court’s
23 finding. See Johnson v. Phelan, 69 F.3d 144, 146–47 (7th Cir.), cert. denied, 519 U.S. 1006
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25 ⁴ The prior Magistrate Judge found that liberally construed, defendant Arranquin’s behavior –
26 watching the strip searches for her own amusement and to humiliate Plaintiff -- sufficed to state a Fourth
27 Amendment claim at the pleading stage. (ECF No. 7 at 3:17-19.) However, this court finds that Plaintiff fails to
28 state a claim against defendant Arranquin. Plaintiff fails to support his conclusory allegations about defendant
Arranquin’s motives with anything but his own conjecture. Moreover, subjective intent is irrelevant for the
purposes of determining the reasonableness of the search under the Fourth Amendment, as long as the
circumstances, viewed objectively, justify the action. Nunez, 591 F.3d at 1228.

1 (1996) (Easterbrook, C.J.) (“Unless female guards are shuffled off to back office jobs, itself
2 problematic under Title VII, they are bound to see the male prisoners in states of undress.
3 Frequently. Deliberately. Otherwise they are not doing their jobs . . . If only men can monitor
4 showers, then female guards are less useful to the prison . . .”); see also Grummett, 779 F.2d at
5 495 (“restricted observations by members of the opposite sex [were not] so degrading as to
6 require intervention by this court”); Michenfelder, 860 F.2d at 334 (female guards observing
7 male prisoner body cavity searches from a control booth that provided limited view of the
8 searches, and female guards sometimes conducting male prisoner shower duty, were reasonable
9 because the female guards were “not routinely present for strip searches” and observation from
10 video monitors “would provide at most an indistinct, limited view”); accord Byrd v. Maricopa
11 Cty. Bd. of Supervisors, 845 F.3d 919, 922 (9th Cir. 2017).

12 Plaintiff also fails to state a claim that his constitutional rights were violated when
13 defendant Rios submitted him to a strip search in front of five other officers. There is no
14 allegation that any of these other officers were female, and there is no evidence in Plaintiff’s
15 allegations that this search violated the Fourth Amendment.

16 Based on the foregoing, the court finds that Plaintiff fails to state a cognizable Fourth
17 Amendment claim against defendants Arraquin and Rios for observing him from the monitor
18 during strip searches and when he was using the bathroom, or against defendant Rios for
19 pulling Plaintiff out of a contact visit to conduct a strip search or conducting a strip search in
20 front of other officers.

21 However, the court finds that Plaintiff states a cognizable Fourth Amendment claim
22 against defendant C/O Rios for conducting excessive, vindictive, and harassing strip searches
23 and fondling Plaintiff’s genitals during a search.

24 **E. Fourteenth Amendment Claims**

25 Plaintiff also claims a violation of his substantive due process rights under the
26 Fourteenth Amendment. However, the concept of substantive due process is expanded only
27 reluctantly and therefore, if a constitutional claim is covered by a specific constitutional
28 provision, the claim must be analyzed under the standard appropriate to that specific provision,

1 not under the rubric of substantive due process. County of Sacramento v. Lewis, 523 U.S. 833,
2 842, 118 S.Ct. 1708 (1998) (quotation marks and citation omitted). Here, the Fourth
3 Amendment protects Plaintiff from unreasonable searches and he may not pursue a separate
4 substantive due process claim. To the extent that Plaintiff also alleges a procedural due process
5 claim, the Second Amended Complaint sets forth no facts supporting the existence of a viable
6 claim premised on a violation of the procedural component of the Due Process Clause.
7 Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384 (2005); Sandin v. Conner, 515 U.S.
8 472, 483-84, 115 S.Ct. 2293 (1995).

9 **F. First Amendment Claim**

10 Allegations of retaliation against a prisoner's First Amendment rights to speech or to
11 petition the government may support a 1983 claim. Rizzo v. Dawson, 778 F.2d 5527, 532 (9th
12 Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989); Pratt v.
13 Rowland, 65 F.3d 802, 807 (9th Cir. 1995). "Within the prison context, a viable claim of First
14 Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some
15 adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that
16 such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action
17 did not reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,
18 567-68 (9th Cir. 2005); accord Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012);
19 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009).

20 An allegation of retaliation against a prisoner's First Amendment right to file a prison
21 grievance is sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283,
22 1288 (9th Cir. 2003). The Court must "'afford appropriate deference and flexibility' to prison
23 officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be
24 retaliatory." Pratt, 65 F.3d at 807 (9th Cir. 1995) (quoting Sandin, 515 U.S. at 482)). The
25 burden is on Plaintiff to demonstrate "that there were no legitimate correctional purposes
26 motivating the actions he complains of." Pratt, 65 F.3d at 808.

27 Plaintiff may be able to state a claim for retaliation. Plaintiff has satisfied elements
28 #(1), #(3), #(4), and #(5) to state a claim for retaliation, as listed above, but he has not satisfied

1 element #(2). Plaintiff satisfies element #(1), because excessive strip searches, fondling, and
2 transferring plaintiff are adverse actions against Plaintiff. Plaintiff also satisfies element #(2),
3 because he alleges that he filed staff complaints against defendant Rios, which is a protected
4 activity. Element #(4), that defendant Rios' adverse actions would chill Plaintiff's exercise of
5 his rights to file prison appeals, is also satisfied. Finally, Plaintiff states that there was no
6 penological purpose for the improper strip searches, satisfying element #(5). However,
7 Plaintiff fails to make sufficient factual allegations to show that defendant Rios acted *because*
8 Plaintiff filed staff complaints. To state a claim, Plaintiff must show a connection between the
9 staff complaints and the improper searches by defendant Rios. Plaintiff alleges that he had
10 problems with Defendant Rios because Plaintiff filed staff complaints, and that the dates of the
11 strip searches coincide with the dates Plaintiff filed the staff complaint. These allegations are
12 not sufficient without supporting facts, such as dates of staff complaints, who the staff
13 complaints were against, dates of improper strip searches, who conducted the strip searches,
14 and whether defendant Rios said or did anything indicating that he conducted the searches
15 *because* Plaintiff filed staff complaints. Plaintiff shall be granted leave to file a Third Amended
16 Complaint curing the deficiencies in this claim found by the court.

17 **V. CONCLUSION AND ORDER**

18 The Court finds that Plaintiff's Second Amended Complaint fails to state a claim upon
19 which relief may be granted. The Court will dismiss the Second Amended Complaint and give
20 Plaintiff leave to amend to file a Third Amended Complaint addressing the issues described
21 above.

22 Under Rule 15(a) of the Federal Rules of Civil Procedure, "[t]he court should freely
23 give leave to amend when justice so requires." Accordingly, the Court will provide Plaintiff
24 **one final opportunity** to file an amended complaint curing the deficiencies identified above.
25 Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file the
26 Third Amended Complaint within thirty days.

27 The Third Amended Complaint must allege constitutional violations under the law as
28 discussed above. Specifically, Plaintiff must state what each named defendant did that led to

1 the deprivation of his constitutional or other federal rights. Fed. R. Civ. P. 8(a); Iqbal, 556 U.S.
2 at 678; Jones, 297 F.3d at 934. As discussed above, there is no *respondeat superior* liability,
3 and each defendant is only liable for his or her own misconduct. Iqbal, 556 U.S. at 676.
4 Plaintiff must also demonstrate that each defendant *personally* participated in the deprivation of
5 her rights by their actions. Jones, 297 F.3d at 934 (emphasis added).

6 Plaintiff should note that although he has been given the opportunity to amend, it is not
7 for the purpose of changing the nature of this suit or adding unrelated claims. George v. Smith,
8 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

9 Plaintiff is required to use the court’s form complaint in preparing the Third Amended
10 Complaint. Plaintiff is also required to include a request for relief in the Third Amended
11 Complaint, allege when and where the events at issue allegedly occurred, and sign the Third
12 Amended Complaint under penalty of perjury.

13 Plaintiff is advised that an amended complaint supercedes the original complaint, Lacey
14 v. Maricopa County, 693 F 3d. 896, 907 n.1 (9th Cir. 2012) (*en banc*), and it must be complete
15 in itself without reference to the prior or superceded pleading, Local Rule 220. Therefore, in an
16 amended complaint, as in an original complaint, each claim and the involvement of each
17 defendant must be sufficiently alleged. The amended complaint should be clearly and boldly
18 titled “Third Amended Complaint,” refer to the appropriate case number, and be an original
19 signed under penalty of perjury.

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

- 21 1. Plaintiff’s Second Amended Complaint is dismissed for the noted procedural
22 deficiencies and, other than Plaintiff’s claim for violation of his Fourth
23 amendment rights against defendant Rios for excessive strip searches and
24 fondling of his genitals, is dismissed for failure to state a claim, however
25 Plaintiff will be granted leave to amend;
- 26 2. The Clerk’s Office shall send Plaintiff a civil rights complaint form;
- 27 3. Plaintiff is granted leave to file a Third Amended Complaint curing the
28 deficiencies identified by the Court in this order, within **thirty (30) days** from

1 the date of service of this order;

- 2 4. Plaintiff is required to use the court's form complaint in preparing the Third
3 Amended Complaint. Plaintiff is also required to include a request for relief in
4 the Third Amended Complaint, to allege when and where the events at issue
5 occurred, and to sign the Third Amended Complaint under penalty of perjury;
- 6 5. Plaintiff shall caption the amended complaint "Third Amended Complaint" and
7 refer to the case number 1:14-cv-00906-AWI-GSA-PC; and
- 8 6. If Plaintiff fails to file a Third Amended Complaint within 30 days, the court
9 will recommend that this case be dismissed for failure to state a claim.

10 IT IS SO ORDERED.

11 Dated: March 6, 2017

12 /s/ Gary S. Austin
13 UNITED STATES MAGISTRATE JUDGE