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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRETT LEE WILLIAMS,
Plaintiff,
v.
T. E. HILL, et al.,
Defendants.

Case No. 1:16-cv-00540-LJO-EPG (PC)
FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT PLAINTIFF’S
THIRD AMENDED COMPLAINT BE
DISMISSED WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM
OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE (21) DAYS
(ECF NO. 46)

Brett Williams (“Plaintiff”) is a state prisoner proceeding *pro se* in this civil rights action filed pursuant to 42 U.S.C. § 1983. Before the Court for screening is Plaintiff’s Third Amended Complaint (“TAC”), which was filed November 19, 2018. (ECF No. 46).

Plaintiff’s prior complaints have been screened twice by Chief District Judge Lawrence J. O’Neill, who dismissed all claims with limited leave to amend. Plaintiff’s claims for deliberate indifference to serious medical needs under the Eighth Amendment were previously dismissed without leave to amend for the reasons described in those orders.

Plaintiff’s TAC largely attempts to reassert his Eighth Amendment claim based on his medical care against over thirty defendants. Because those claims have already been dismissed

1 with prejudice, the Court will recommend that Plaintiff's TAC be dismissed without further leave
2 to amend, and that the case be closed.

3 Plaintiff has twenty-one days from the date of service of this order to file objections to
4 these findings and recommendations.

5 **I. 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). The
8 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
9 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
10 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

11 A complaint is required to contain "a short and plain statement of the claim showing that
12 the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
13 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
14 conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
15 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual
16 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting
17 *Twombly*, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting this
18 plausibility standard. *Id.* at 679. While a plaintiff's allegations are taken as true, courts "are not
19 required to indulge unwarranted inferences." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681
20 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a plaintiff's legal
21 conclusions are not accepted as true. *Iqbal*, 556 U.S. at 678.

22 Pleadings of *pro se* plaintiffs "must be held to less stringent standards than formal
23 pleadings drafted by lawyers." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (holding that
24 *pro se* complaints should continue to be liberally construed after *Iqbal*).

25 **II. BACKGROUND**

26 Plaintiff filed his first complaint over two years ago, on April 18, 2016. (ECF No. 1). His
27 complaints have been screened twice, with holdings relevant to this screening order.

28 Plaintiff's first complaint, filed April 18, 2016, is 75 pages long, including exhibits. (ECF

1 No. 1). That complaint includes five claims against Defendants under § 1983. The first two
2 claims allege Defendants violated Plaintiff's rights under the Eighth Amendment and its state
3 law corollary, Article I, § 17 of the California Constitution ("§ 17"). Both claims are based on
4 Plaintiff's assertions that Defendants violated his rights so by not informing him that he had a
5 high risk for future irreparable serious medical harm from Cocci exposure; that his Obstructive
6 Sleep Apnea at night and Allergic Rhinitis during the day were injuries linked to Cocci exposure
7 while Defendants housed Plaintiff in known Cocci endemic areas; and that Defendants failed to
8 render recommended medical treatment for said chronic Cocci linked injuries. Plaintiff's third
9 and fourth claims, brought under the Fourteenth Amendment and Article I, § 15 of the California
10 Constitution ("§ 15"), are also premised on these assertions, but also allege that Defendants
11 violated his Due Process rights "by their participation in retaliatory acts to impede Plaintiff from
12 timely filing tort claims after Plaintiff filed . . . [a] grievance." Plaintiff's fifth claim, brought
13 under the First Amendment and its state law corollary, Article I, § 2(a) of the California
14 Constitution ("§ 2(a)), adds the allegation that Defendants violated his First Amendment and §
15 2(a) rights "by their participation in acts to chill/prevent/impede Plaintiff from timely filing tort
16 claim notices after Plaintiff filed . . . [a] grievance."

17 Judge O'Neill screened Plaintiff original complaint on June 20, 2016. (ECF No. 5).

18 Regarding the Eighth Amendment claim, the Court stated:

19 Plaintiff's first two claims do not state a viable claim for a number of reasons. To
20 the extent the claims are premised on Defendants' failure to warn Plaintiff of the
21 dangers posed by cocci exposure, the claims fail. The Court is unaware of any case
22 holding that a prison official's failure to warn an inmate of a potential dangerous
23 condition could provide the basis for an Eighth Amendment violation.

24 To the extent Plaintiff's claims are premised on his assertion that Defendants
25 violated his rights by exposing him to cocci, his claims fail. First, Plaintiff appears
26 to allege he was first exposed to cocci sometime in 2008 when housed at Corcoran.
27 None of the Defendants is alleged to have been involved with CSP or the decision
28 of housing Plaintiff there. Nor are Defendants alleged to have any control over
where Plaintiff is housed. Second, Plaintiff fails to allege any facts suggesting that,
at the time of his placement in CSP, Defendants knew of the alleged danger cocci in
the area posed and failed to respond. Put another way, Plaintiff fails to allege facts
demonstrating that Defendants were deliberately indifferent to the risks cocci posed
to Plaintiff.

1 (ECF No. 5, at p. 5). As to the Eighth Amendment claims regarding medical care, the Court
2 stated:

3 Plaintiff does not allege facts suggesting any Defendant was deliberately indifferent
4 to Plaintiff's serious medical needs. The primary basis for Plaintiff's medical claims
5 is that some of the Defendants did not implement the recommendations of some of
6 his previous medical providers. Specifically, Plaintiff claims certain Defendants
7 refused to prescribe Plaintiff certain prescriptions and procedures that his previous
8 doctors had recommended, instead denying them or prescribing him different ones.
9 Plaintiff also alleges Defendants failed to inform him that his medical problems were
10 linked to his cocci exposure when they first presented. At best, Plaintiff's allegations
11 suggest a mere difference of medical opinion and/or a failure to diagnose Plaintiff
12 correctly. They do not suggest medical malpractice—which would still be
13 insufficient under the Eighth Amendment—much less deliberate indifference,
14 particularly given that Plaintiff does not allege any resulting injury from
15 Defendants' alleged conduct.

16 (ECF No. 5, at p. 6) (footnote omitted). Regarding Plaintiff's Fourteenth and First Amendment
17 claims, the Court stated:

18 Plaintiff claims certain Defendants failed to process his medical tort claim and his
19 multiple appeals of the denial of the claim in a timely manner. But it does not appear
20 Plaintiff was unable to file the claim or appeals, or that any alleged delay affected
21 Plaintiff's rights. In fact, Plaintiff alleges that he "completed the tort claim notice
22 proceedings on August 21, 2015." Plaintiff provides as attachments to his complaint
23 a document from the Office of Third Level Appeals denying his third appeal and
24 informing Plaintiff that its decision "exhausts his administrative remedies." Plaintiff
25 also provides as an attachment an August 21, 2015 document from the Victim
26 Compensation and Government Claims Board stating that Board's belief that "the
27 court system is the appropriate means for resolution of [Plaintiff's] claim," that the
28 Board would act on his claim on September 17, 2015, and that the Board's rejection
of his claim will allow Plaintiff to litigate the claim. The Court therefore cannot
discern how any of Plaintiff's rights were violated, even assuming Defendants did
not timely process Plaintiff's claims and appeals as he alleges for retaliatory reasons.

(ECF No. 5, at pgs. 6-7). The Court dismissed Plaintiff's complaint with leave to amend.

After an extension of time, Plaintiff filed a 75-page First Amended Complaint on July 27,
2016 (ECF No. 9). Rather than repeat it here, the Court refers to the extensive summary of
Plaintiff's First Amended Complaint provided in the screening order of April 26, 2017. (ECF No.
10, at pgs. 3-8).

Judge O'Neill screened Plaintiff's First Amended Complaint on April 26, 2017. (ECF
No. 10). The Court reviewed the complaint's allegations in detail and found that the Eighth

1 Amendment claims should be dismissed without leave to amend and allowed limited leave to
2 amend as to other claims. The Court concluded, “the Court DISMISSES the complaint with
3 partial leave to amend. As explained above, Plaintiff’s claims of Eighth Amendment deliberate
4 indifference to Plaintiff’s serious medical needs or Plaintiff’s conditions of confinement related to
5 cocci exposure are denied without leave to amend. Plaintiff therefore may not amend his
6 complaint to allege either Eighth Amendment claim. . . . This will be Plaintiff’s last opportunity
7 to plead properly his First and Fourteenth Amendment allegations. He will not again be given
8 leave to amend.” (ECF No. 10, at pgs. 19-20). As the Court thoroughly addressed the Eighth
9 Amendment claims in that order, the Court will not repeat that analysis here.

10 Regarding the claims that Plaintiff was given leave to amend, namely the First and
11 Fourteenth Amendment claims, the Court gave the following guidance (emphasis added):

12 Plaintiff’s second cause of action is premised on his allegation that Defendants
13 violated his freedom of speech by retaliating against him for filing grievances. It is
14 not clear on what facts Plaintiff bases this claim other than conclusory statements
15 that Defendants were involved in an “underground” scheme to ignore health risks
posed by cocci and intentionally delayed the processing of grievances and appeals
Plaintiff filed with CCHCS.

16 Allegations of retaliation against a prisoner’s First Amendment rights to speech or
17 to petition the government may support a § 1983 claim. *Pratt v. Rowland*, 65 F.3d
18 802, 806 (9th Cir. 1995). Within the prison context, a viable claim of First
19 Amendment retaliation entails five basic elements: (1) An assertion that a state actor
20 took some adverse action against an inmate (2) because of (3) that prisoner’s
protected conduct, and that such action (4) chilled the inmate’s exercise of his First
21 Amendment rights, and (5) the action did not reasonably advance a legitimate
correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004)
(footnote and citations omitted).

22 Plaintiff has not alleged sufficient facts to establish a claim of First Amendment
23 retaliation. Plaintiff asserts that Defendants rejected or delayed his grievances and
24 appeals, which constitutes an adverse action. An adverse action may be a harm or a
25 threat of harm, and may be explicit or implied. *Brodheim v. Cry*, 584 F.3d 1262,
26 1270 (9th Cir. 2009). Though an adverse action need not be an independent
27 constitutional violation, inconsequential or de minimis harms do not constitute
28 adverse actions. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (to support
a claim a harm must be “more than minimal”) (citations omitted); *see also Bell v.*
Johnson, 308 F.3d 594, 603 (6th Cir. 2002) (“[S]ome adverse actions are so de
minimis that they do not give rise to constitutionally cognizable injuries.” (citing
Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th Cir. 1999))). Even so, “a retaliation
claim may assert an injury no more tangible than a chilling effect on First

1 Amendment rights.” *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001). A
2 prisoner need not demonstrate that his speech was actually suppressed. *Rhodes v.*
3 *Robinson*, 408 F.3d 559, 459 (9th Cir. 2004) (rejecting arguments that a prisoner’s
4 ability to file a First Amendment retaliation claim belied his claim of chilling
5 effects).

6 Three of Plaintiff’s appeals were rejected or cancelled, namely NKSP-HC-
7 15026065, FSP-HC-15015749, and NKSP-HC-15026308. NKSP-HC-15026065
8 was dismissed as untimely filed and FSP-HC-15015749 was dismissed as submitted
9 at the incorrect level of review. The third appeal, NKSP-HC-15026308, appears to
10 have been cancelled because it was an appeal of the aforementioned dismissals.
11 Plaintiff alleges that “[t]he adverse effect of the three cancellation notices was to
12 prevent Plaintiff from completion of the grievance process at NKSP.” Doc. 9 at ¶
13 31. While it is not clear from the complaint what issues he was unable to exhaust
14 through the grievance process, the improper rejection or delay of Plaintiff’s
15 grievances and appeals by itself could plausibly deter a reasonable person from
16 exercising First Amendment rights.

17 The Court need not determine whether Defendants’ actions did in fact constitute
18 adverse actions, however. Even if the delays in processing his grievances were
19 adverse actions, however, **Plaintiff does not allege plausible facts which suggest
20 that his grievances and appeals were delayed because of his protected activity
21 of filing grievances and appeals. To show a causal connection between an
22 alleged adverse action and a prisoner’s protected conduct, “a plaintiff must
23 show that his protected conduct was the substantial or motivating factor behind
24 the defendant’s conduct.”** *Brodheim*, 584 F.3d at 1271. An allegation of suspect
25 timing may constitute circumstantial evidence of a causal connection, but ordinarily
26 is not itself sufficient. **Particularly here, where there is a necessary connection
27 between the alleged protected activity of filing grievances and the alleged
28 adverse action of denying appeals related to those grievances, there must be
something more to show the type of causal connection contemplated in a
retaliation action. This is not an insurmountable bar to Plaintiff’s claim. All he
need do is allege sufficient facts to permit the plausible inference that there was
a causal relationship between his protected activity and the alleged retaliation.**
Therefore, Plaintiff’s First Amendment claim is DISMISSED with leave to amend.

29

30 Plaintiff’s third cause of action appears to be grounded in allegations that
31 Defendants did not disclose the risk posed by cocci to African-American inmates
32 and inmates in California correctional institutions, and thereby denied him due
33 process. He also alleges that delays in processing and reviewing his various
34 grievances and appeals by Defendants deprived him of due process. Finally, Plaintiff
35 alleges that he was deprived of equal protection due to the same actions.

36 The Due Process Clause protects prisoners from being deprived of liberty without
37 due process of law. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). In order to state
38 a cause of action for deprivation of due process, a plaintiff must first establish the

1 existence of a liberty interest for which the protection is sought. States may under
2 certain circumstances create liberty interests which are protected by the Due Process
3 Clause. *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Liberty interests created by
4 state law are generally limited to freedom from restraint which imposes atypical and
5 significant hardship on the inmate in relation to the ordinary incidents of prison life.
6 *Id.*

7 Here, Plaintiff alleges that Defendants deprived him of due process in his grievance
8 procedure. “The Due Process Clause provides prisoners two separate sources of
9 protection against unconstitutional state disciplinary actions. First, a prisoner may
10 challenge a disciplinary action which deprives or restrains a state-created liberty
11 interest in some ‘unexpected manner.’” *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th
12 Cir. 2003) (quoting *Sandin*, 515 U.S. at 483-84. Second, a state action which does
13 not impact a protected liberty interest may be challenged if it “nonetheless imposes
14 some ‘atypical and significant hardship on the inmate in relation to the ordinary
15 incidents of prison life.’” *Ramirez*, 334 F.3d 850 (quoting *Sandin*, 515 U.S. at 484).
16 **Plaintiff’s amended complaint has no allegation which can be construed as a
17 claim that Defendants imposed an “atypical and significant hardship” on
18 Plaintiff.**

19 **For Plaintiff’s due process claim to survive, therefore, he must have alleged
20 that the grievance process was conducted in a manner such that it deprived or
21 restrained a state-created liberty interest in an unexpected manner.** “[I]nmates
22 lack a separate constitutional entitlement to a specific prison grievance procedure.”
23 *Ramirez*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that there is no liberty interest
24 implicated in processing of appeals because there is no entitlement to a specific
25 grievance procedure) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988)).
26 “[A prison] grievance procedure is a procedural right only, it does not confer any
27 substantive right upon the inmates.” *Azeez v. DeRobertis*, 568 F. Supp. 8, 10 (N.D.
28 Ill. 1982); accord *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993); see also
Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of grievance
procedure confers no liberty interest on prisoner). “Hence, [a prison grievance
procedure] does not give rise to a protected liberty interest requiring the procedural
protections envisioned by the Fourteenth Amendment.” *Azeez*, 568 F. Supp. at 10;
Spencer v. Moore, 638 F. Supp. 315, 316 (E.D. Mo. 1986).

Further, while inmates have a fundamental constitutional right of access to the
courts, *Lewis v. Casey*, 518 U.S. 343, 346 (1996), which extends to established
grievance procedures, *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir.1995), *overruled
on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230, n. 2 (2001), the right is
merely to bring to court a grievance the inmate wishes to present and is limited to
direct criminal appeals, habeas petitions, and civil rights actions. *Lewis*, 518 U.S. at
354. **To bring a claim for deprivation of access to the courts, a plaintiff must
have suffered an actual injury by being shut out of court.** *Christopher v.
Harbury*, 536 U.S. 403, 415 (2002); *Lewis*, 518 U.S. at 351.

**The complaint does not indicate that Plaintiff’s ability to file or appeal
grievances was obstructed in any manner.** One of his appeals was partially

1 granted. A document attached to Plaintiff's complaint and sent to him from the
2 Office of Third Level appeals denied his third appeal and informed Plaintiff that its
3 decision "exhausts his administrative remedies." Doc. 9 at 73-74. Another document
4 from the Victim Compensation and Government Claims Board indicated that "the
5 court system is the appropriate means for resolution of [Plaintiff's] claims." Doc. 9
6 at 75. **Plaintiff's amended complaint does not indicate that he was actually
7 impaired in his ability to file grievances, and his allegations indicate that he was
8 in fact able to file grievances which progressed through the grievance system.
9 Given the foregoing, it is not clear from Plaintiff's complaint that he was denied
10 due process, even assuming Defendants did not timely process his claims and
11 appeals. The Court simply cannot discern any way in which Plaintiff's rights
12 were violated by Defendants' alleged actions. Consequently, Plaintiff's due
13 process claim is DISMISSED with leave to amend.**

9 Plaintiff has also failed to set out a cause of action supporting his equal protection
10 claims. The Equal Protection Clause of the Fourteenth Amendment requires that
11 persons who are similarly situated be treated alike. *City of Cleburne v. Cleburne
12 Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To establish an equal protection claim,
13 a plaintiff must show that the defendant intentionally discriminated against the
14 plaintiff based on the plaintiff's membership in a protected class. *Serrano v. Francis*,
15 345 F.3d 1071, 1082 (9th Cir. 2003). Alternately, a plaintiff may show that similarly
16 situated individuals were intentionally subject to disparate treatment without a
17 rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech*,
18 528 U.S. 562, 564 (2000). In the prison context, the right to equal protection is
19 viewed through a standard of reasonableness, specifically whether the actions of
20 prison officials are "reasonably related to legitimate penological interests." *Walker
21 v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) (citing *Turner v. Safley*, 482 U.S. 78,
22 89 (1987)).

18 Plaintiff identifies himself as an African-American inmate. Doc. 9 ¶ 17. **Assuming
19 that he is a member of a protected class, the facts alleged in Plaintiff's
20 complaint do not show the existence of any "underground" policy or practice
21 of targeting him or other African-American inmates. Plaintiff has also not
22 alleged any other facts which show that he was subjected to disparate treatment
23 as compared to similarly situated individuals. Status in a protected class alone
24 does not set forth an equal protection claim absent at least some facts which
25 would indicate disparate treatment or discrimination. Plaintiff has not alleged
26 any such facts.** Therefore, his Fourteenth Amendment Equal Protection claim also
27 fails, and the Court DISMISSES the claim with leave to amend.

24 (ECF No. 10) (footnote omitted).

25 Plaintiff was given 30 days from that date of that order, which was dated April 26, 2017,
26 to file an amended complaint, only regarding the causes of action dismissed with leave to amend.
27 (ECF No. 10). Plaintiff requested an extension of time to file an amended complaint (ECF No.
28 11) and the Court gave him an extension until June 30, 2017 (ECF No. 12). Rather than file an

1 amended complaint, Plaintiff filed a notice of appeal. (ECF No. 15). On August 18, 2017, the
2 Ninth Circuit dismissed Plaintiff's appeal because it lacked jurisdiction. (ECF Nos. 22 & 23).

3 As Plaintiff still had not filed an amended complaint as of August 28, 2017, the Court
4 issued an order to show cause why the case should not be dismissed. (ECF No. 25). Plaintiff
5 filed a motion for stay and abeyance on October 2, 2017 (ECF No. 26), which was denied on
6 October 5, 2017 (ECF No. 27). Plaintiff filed two more motions for extensions of time. (ECF
7 Nos. 28, 29). The Court gave Plaintiff until February 2, 2018, to file an amended complaint.
8 (ECF No. 30). After several more extensions and similar filings, Plaintiff filed his TAC on
9 November 19, 2018 (ECF No. 46), which is before this Court for screening.

10 Plaintiff's TAC is 123 pages long and asserts claims against more than thirty defendants.

11 **III. ANALYSIS OF THIRD AMENDED COMPLAINT**

12 Plaintiff asserts three causes of action in his TAC: (1) violation of the Eighth Amendment
13 based on deliberate indifference to serious medical needs; (2) violation of the First Amendment
14 right to freedom of speech, and (3) an additional claim for violation of the First Amendment. As
15 the Eighth Amendment claim was already dismissed with prejudice, without leave to amend, the
16 Court only addresses the two claims for violation of the First Amendment.

17 Allegations of retaliation against a prisoner's First Amendment rights to speech or to
18 petition the government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532
19 (9th Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt v.*
20 *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). "Within the prison context, a viable claim
21 of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took
22 some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and
23 that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action
24 did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559,
25 567– 68 (9th Cir. 2005).

26 The TAC provides very little facts supporting these claims, or explanation why he
27 believes his first amendment rights were violated. The TAC does not include any allegations
28 responsive to the Court's earlier instructions in its screening order, including facts suggesting

1 grievances were delayed because of protected activity of filing grievances, or facts showing a
2 causal connection between an alleged adverse action and Plaintiff's protected conduct.

3 Rather, the TAC relies on the allegation that all Plaintiff's rights were connected and thus
4 the deliberate indifference to serious medical needs supports the other claims. For example,
5 Plaintiff's introductory paragraph explains: "Plaintiff files this civil lawsuit for prospective
6 injunctive and declaratory relief and for monetary damages from defendants [sic]deliberate
7 indifference to plaintiff's coronary artery disease needs, congestive heart failure needs,
8 hyperlipidemia needs, and obstructive sleep apnea needs." (ECF No. 46, at p. i). Plaintiff then
9 attempts to characterize these claims as First Amendment claims by stating that "Defendants
10 deliberate indifference conduct has been intertwined and inseperable from freedom of speech
11 (retaliation) against plaintiff for enforcing his petition rights to redress grievances in court. i.e.,
12 this lawsuit and grievances related to this lawsuit." (*Id.* at ii) (typographical errors in original).
13 *See also id.* ("Since January 2013 defendants at Folsom State Prison have continued the concerted
14 deliberate indifference to plaintiff serious medical needs inseperable intertwined with freedom of
15 speech actions to current."). The facts of the case similarly concern Plaintiff's medical care, and
16 his allegation that Defendants failed to provide constitutionally required care. Plaintiff's
17 allegations regarding the first amendment are based on the premise that the failure to provide
18 medical care violated his freedom of speech. *See e.g., id.* at 16 ("[Defendant Jane Doe]
19 established the first freedom of speech intertwined inseperable from deliberate indifference to
20 plaintiff obstructive sleep apnea in a series of related constitutional violations."). Plaintiff
21 specifically alleges that certain actions were done in retaliation for grievances filed related to
22 medical care, but fails to set forth any facts supporting this allegation. For example, Plaintiff
23 alleges that "[t]he July 21, 2010 sleep study consult was performed and in retaliation against
24 plaintiff filing the AI-21-2009-11637 plaintiff was transfered to PVSP on July 27, 2010 in order
25 to prevent plaintiff form timely taking legal action and to conceal the consult at NKSP-medical
26 records." (*Id.* at 17) (typographical errors in original). Similarly, Plaintiff alleges that "[t]he
27 freedom of speech was expanded to include reduction of simvastatin from 40 mg (NKSP dosage)
28 to 5mg initiated by defendant Ogbuehi." (*Id.*).

1 Plaintiff's allegations fail to establish a violation of his First Amendment rights based on
2 the legal standards described above, and in earlier screening orders. Rather, the TAC attempts to
3 assert claims that have already been dismissed without leave to amend in earlier orders.

4 **IV. RECOMMENDATIONS**

5 The Court has screened the TAC and finds that it fails to state a cognizable claim under the
6 relevant legal standards.

7 The Court does not recommend granting leave to amend. This is Plaintiff's Third
8 Amended Complaint and the previous screening orders described clearly the legal standards and
9 elements for the claims, and also stated that no further leave to amend would be granted.

10 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 11 1. Plaintiff's claims be DISMISSED with prejudice for failure to state a claim;¹ and
- 12 2. The Clerk of Court be directed to CLOSE this case.

13 These findings and recommendations will be submitted to the United States district judge
14 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one
15 (21) days after being served with these findings and recommendations, Plaintiff may file written
16 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
17 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
18 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
19 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20
21 IT IS SO ORDERED.

22 Dated: February 1, 2019

23 /s/ Eric P. Gray
24 UNITED STATES MAGISTRATE JUDGE

25
26
27
28 ¹ This Court believes this dismissal would be subject to the "three-strikes" provision set forth in 28 U.S.C. § 1915(g). Coleman v. Tollefson, 135 S. Ct. 1759, 1763 (2015).