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4 **UNITED STATES DISTRICT COURT**  
5 **EASTERN DISTRICT OF CALIFORNIA**  
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7 **TERRENCE McCREA,**

8 **Plaintiff,**

9 **v.**

10 **LESNIAK, et al.,**

11 **Defendants.**

Case No. 1:17-cv-01329-LJO-SAB (PC)

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSING  
COMPLAINT WITHOUT LEAVE TO  
AMEND FOR FAILURE TO STATE A  
CLAIM**

(ECF No. 12)

**OBJECTIONS DUE WITHIN THIRTY  
DAYS**

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15 Plaintiff Terrence McCrea is appearing pro se and in forma pauperis in this civil rights  
16 action pursuant to 42 U.S.C. § 1983. Currently before the Court is Plaintiff’s first amended  
17 complaint, filed January 23, 2018. For the reasons discussed, the Court recommends that  
18 Plaintiff’s first amended complaint be dismissed without leave to amend.

19 **I.**

20 **SCREENING REQUIREMENT**

21 The Court is required to screen complaints brought by prisoners seeking relief against a  
22 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
23 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
24 legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or  
25 that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §  
26 1915(e)(2)(B).

27 A complaint must contain “a short and plain statement of the claim showing that the  
28 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not

1 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
2 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
3 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate  
4 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.  
5 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

6 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings  
7 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d  
8 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be  
9 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer  
10 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss  
11 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant  
12 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s  
13 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572  
14 F.3d at 969.

15 **II.**

16 **DISCUSSION**

17 On January 10, 2018, the Court screened Plaintiff’s complaint and dismissed it for failure  
18 to state a claim. (ECF No. 11.) Plaintiff’s first amended complaint is substantially similar  
19 although he has deleted some of the factual allegations contained in the original complaint.

20 The first amended complaint alleges that Plaintiff was subjected to harm to his health  
21 when Defendant Lesniak conducted a cell extraction using chemical agents. (First Am. Compl.  
22 4,<sup>1</sup> ECF No. 12.) Before the cell extraction took place, Plaintiff asked to be removed from the  
23 area to avoid having to breathe the gases but he was ignored. (Id.) Plaintiff contends that  
24 Defendant Lesniak was aware of the chemicals that were being used and the effects it would  
25 have on the inmate on whom it was used and that he would be immobilized. (Id.) Defendant  
26 Lesniak also knew the effect the gases would have on Plaintiff. (Id.) Plaintiff alleges that he had

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28 <sup>1</sup> All references to pagination of specific documents pertain to those as indicated on the upper right corners via the  
CM/ECF electronic court docketing system.

1 the right by policy to be removed from his cell and the right to decontaminate. (Id.) Plaintiff is  
2 seeking \$40,000 due to his lungs being sore from being exposed to the chemical agent. (Id.)

3 To prove a violation of the Eighth Amendment the plaintiff must “objectively show that  
4 he was deprived of something ‘sufficiently serious,’ and make a subjective showing that the  
5 deprivation occurred with deliberate indifference to the inmate’s health or safety.” Thomas v.  
6 Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (citations omitted). Deliberate indifference requires  
7 a showing that “prison officials were aware of a “substantial risk of serious harm” to an inmates  
8 health or safety and that there was no “reasonable justification for the deprivation, in spite of that  
9 risk.” Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837, 844 (1994)). Officials may be aware  
10 of the risk because it is obvious. Thomas, 611 F.3d at 1152.

11 Where an inmate is challenging the conditions of confinement he must show there was a  
12 deprivation “sufficiently serious” to form the basis of a violation and “the prison official acted  
13 “with a sufficiently culpable state of mind.” Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir.  
14 2006) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). The circumstances, nature, and  
15 duration of the deprivations are critical in determining whether the conditions complained of are  
16 grave enough to form the basis of a viable Eighth Amendment claim.” Johnson, 217 F.3d at 731.

17 Plaintiff has failed to allege facts to show that he was at a substantial risk of harm by  
18 being in the area in which the cell extraction took place. Although Plaintiff states that he asked  
19 to be moved from the area before the inmate was extracted from his cell and Defendant Lesniak  
20 knew that the exposure would immobilize the other inmate, such conclusory allegations  
21 regarding Defendant Lesniak’s knowledge of harm from the chemical agent fails to show that he  
22 would be aware that Plaintiff would be at a risk of harm from the use of the chemical agent on  
23 another individual. Plaintiff fails to allege any facts to show that Defendant Lesniak would be  
24 aware that Plaintiff was at a substantial risk of harm by being in the area. Plaintiff’s vague  
25 allegation that he was exposed to pepper spray that was being used to extract another inmate  
26 from his cell is insufficient to state a claim for deliberate indifference.

27 Plaintiff also relies upon California Department of Corrections and Rehabilitation’s  
28 decontamination policy, however, the policy states the whether an inmate who is not directly

1 exposed to chemical agents should be decontaminated will be based upon obvious, physical  
2 effects of the chemical agent. (See Compl. p. 9, ECF No. 1.) Although Plaintiff alleges that he  
3 was not decontaminated, the complaint is devoid of any facts that he informed anyone of a need  
4 for decontamination or that he was suffering any obvious, physical effects from the exposure.

5 The fact that Plaintiff did not want to be in the area where the chemical agent was used,  
6 without more, is not sufficient to demonstrate a substantial risk of harm. Further, Plaintiff's first  
7 amended complaint only contains conclusory allegations of a failure to decontaminate that are  
8 insufficient to state a claim. Plaintiff has alleged no facts to state a plausible claim that  
9 Defendant Lesniak was aware that Plaintiff was at a substantial risk of harm and failed to  
10 adequately respond. Plaintiff has failed to state a claim against Defendant Lesniak.

### 11 III.

#### 12 CONCLUSION AND RECOMMENDATION

13 Plaintiff's first amended complaint fails to state a cognizable claim for violation of his  
14 federal rights. Plaintiff was previously notified of the applicable legal standards and the  
15 deficiencies in his pleading, and despite guidance from the Court, Plaintiff's first amended  
16 complaint is largely identical to the original complaint. Based upon the allegations in Plaintiff's  
17 original and first amended complaint, the Court is persuaded that Plaintiff is unable to allege any  
18 additional facts that would support a claim for cruel and unusual punishment in violation of the  
19 Eighth Amendment, and further amendment would be futile. See Hartmann v. CDCR, 707 F.3d  
20 1114, 1130 (9th Cir. 2013) ("A district court may not deny leave to amend when amendment  
21 would be futile.") Based on the nature of the deficiencies at issue, the Court finds that further  
22 leave to amend is not warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v.  
23 Carlson, 809 F.2d 1446-1449 (9th Cir. 1987).

24 Accordingly, IT IS HEREBY RECOMMENDED that Plaintiff's complaint be dismissed  
25 without leave to amend for failure to state a claim.

26 This findings and recommendations is submitted to the district judge assigned to this  
27 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within thirty (30)  
28 days of service of this recommendation, Plaintiff may file written objections to this findings and

1 recommendations with the Court. Such a document should be captioned “Objections to  
2 Magistrate Judge’s Findings and Recommendations.” The district judge will review the  
3 magistrate judge’s findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).  
4 Plaintiff is advised that failure to file objections within the specified time may result in the  
5 waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing  
6 Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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8 IT IS SO ORDERED.

9 Dated: March 22, 2018

  
UNITED STATES MAGISTRATE JUDGE

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