



1 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
2 frivolous, malicious, fail to state a claim upon which relief may be granted, or that seek monetary  
3 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2); 28 U.S.C.  
4 § 1915(e)(2)(B)(i)-(iii). A complaint will be dismissed if it lacks a cognizable legal theory or fails  
5 to allege sufficient facts under a cognizable legal theory. *See Balistreri v. Pacifica Police*  
6 *Department*, 901 F.2d 696, 699 (9th Cir. 1990).

7 **C. Summary of the Complaint**

8 Plaintiff is currently housed at the Substance Abuse Treatment Facility (“SATF”) in  
9 Corcoran, California, where the incident of which he complains occurred. Plaintiff names the  
10 following defendants: Warden Stu Sherman; Associate Warden Reynoso; Second Watch Captain  
11 S. Marsh; Second Watch Yard Officer, Ruelas; Second Watch Tower Officer J. Curry; and tram  
12 truck driver Morales. Plaintiff alleges that, on the morning of March 12, 2017, Morales drove the  
13 tram truck containing breakfast and lunch to the D-Facility. When inmate porters arrived to  
14 unload the food, they encountered a foul odor which smelled like human feces. They informed  
15 Morales of the smell, but Morales ordered them to unload the truck and push the carts of food into  
16 the building for inmate consumption.

17 The inmate porters complied, but when they went inside the building, they discovered  
18 what they believed to be human feces smeared on the side of the food carts and lunch boxes.  
19 Ruelas was notified and ordered the inmates to clean the feces off the carts and lunch boxes. The  
20 inmate porters protested. Tower officer J. Curry called the inmate porters to the gun tower and  
21 instructed them not to tell the other inmates about the contaminated food. During this  
22 conversation, other inmate porters passed out the contaminated food to inmates in the building.  
23 Plaintiff received his food and ate it before an unknown sergeant showed up and recalled all of  
24 the contaminated food. Plaintiff became ill with stomach cramps, vomiting and lack of sleep  
25 which allegedly resulted in post-traumatic stress disorder. Plaintiff alleges that Warden Sherman,  
26 Associate Warden Reynoso, and Captain Marsh all contributed to “a systematic pattern of events  
27 by failure to protect inmates from the spread of H.Pylori which is transmitted by fecal matter.”

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1 Plaintiff alleges a violation of his Eighth and Fourteenth Amendment rights<sup>1</sup> and seeks  
2 monetary damages. As discussed below, these allegations state a cognizable claim against  
3 Officer Ruelas, Officer Curry, and Morales, but not against any of the other named defendants.  
4 As Plaintiff may be able to correct the deficiencies in his pleading, he is provided the pleading  
5 requirements, the standards for claims for the rights he contends have been violated, and leave to  
6 file a first amended complaint.

7 **C. Pleading Requirements**

8 **1. Federal Rule of Civil Procedure 8(a)**

9 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited  
10 exceptions,” none of which applies to section 1983 actions. *Swierkiewicz v. Sorema N. A.*, 534  
11 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). A complaint must contain “a short and plain  
12 statement of the claim showing that the pleader is entitled to relief . . . .” Fed. R. Civ. Pro. 8(a).  
13 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and  
14 the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512.

15 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a  
16 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556  
17 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
18 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is  
19 plausible on its face.’” *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555. Factual  
20 allegations are accepted as true, but legal conclusions are not. *Iqbal*, at 678; *see also Moss v. U.S.*  
21 *Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *Twombly*, 550 U.S. at 556-557.

22 While “plaintiffs [now] face a higher burden of pleadings facts . . . ,” *Al-Kidd v. Ashcroft*,  
23 580 F.3d 949, 977 (9th Cir. 2009), the pleadings of *pro se* prisoners are still construed liberally  
24 and are afforded the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

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26 <sup>1</sup> Plaintiff also contends these allegations violated his rights under Articles 1, 3, 5, 17, and 25 of the California  
27 Constitution. However, addressing Plaintiff’s federal constitutional claims resolves his claims under the Articles of  
28 California’s Constitution. *Los Angeles County Bar Assoc. v. Eu*, 979 F.2d 697, 705 (9th Cir. 1992) (citing *Payne v.*  
*Superior Court*, 132 Cal.Rptr. 405, 410 n. 3 (1976) (the California Constitution provides the same basic guarantee as  
the Fourteenth Amendment of the United States Constitution)).

1 However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations,”  
2 *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989), “a liberal interpretation of a civil rights  
3 complaint may not supply essential elements of the claim that were not initially pled,” *Bruns v.*  
4 *Nat’l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) quoting *Ivey v. Bd. of Regents*,  
5 673 F.2d 266, 268 (9th Cir. 1982), and courts are not required to indulge unwarranted inferences,  
6 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and  
7 citation omitted). The “sheer possibility that a defendant has acted unlawfully” is not sufficient,  
8 and “facts that are ‘merely consistent with’ a defendant’s liability” fall short of satisfying the  
9 plausibility standard. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949; *Moss*, 572 F.3d at 969.

10 If Plaintiff chooses to file a first amended complaint, it should be as concise as possible.  
11 Plaintiff should simply state which of his constitutional rights he believes were violated by each  
12 Defendant and the supporting factual basis. Where the allegations against two or more  
13 Defendants are factually intertwined, factual allegations need not be separately stated against each  
14 Defendant. Plaintiff should instead present his factual allegations and identify the Defendants he  
15 believes are thereby implicated.

## 16 **2. Linkage Requirement**

17 The Civil Rights Act (42 U.S.C. § 1983) requires that there be an actual connection or link  
18 between the actions of the defendants and the deprivation alleged to have been suffered by  
19 Plaintiff. See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423  
20 U.S. 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation  
21 of a constitutional right, within the meaning of section 1983, if he does an affirmative act,  
22 participates in another’s affirmative acts or omits to perform an act which he is legally required to  
23 do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743  
24 (9th Cir. 1978). To state a claim for relief under section 1983, Plaintiff must link each named  
25 defendant with some affirmative act or omission that demonstrates a violation of Plaintiff’s  
26 federal rights.

27 Plaintiff must clearly identify which Defendant(s) he believes are responsible for each  
28 violation of his constitutional rights and set forth the supporting factual basis, as his Complaint

1 must place each Defendant on notice of Plaintiff's claims against that Defendant. *See Austin v.*  
2 *Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004).

3 **D. Plaintiff's Claims for Relief**

4 **1. Eighth Amendment**

5 Adequate food is a basic human need protected by the Eighth Amendment. *Hoptowit v.*  
6 *Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982), (abrogated on other grounds by *Sandin v. O'Connor*,  
7 515 U.S. 472 (1995)). While prison food need not be "tasty or aesthetically pleasing," it must be  
8 "adequate to maintain health." *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993). However,  
9 extreme deprivations are required to make out a conditions of confinement claim, and only those  
10 deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to  
11 form the basis of an Eighth Amendment violation. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)  
12 (citations and quotations omitted). To state a claim for violation of the Eighth Amendment, the  
13 plaintiff must allege facts sufficient to support a claim that prison officials knew of and  
14 disregarded a substantial risk of serious harm to the plaintiff. *Farmer v. Brennan*, 511 U.S. 825,  
15 847 (1994); *Foster*, 554 F.3d at 812. The minimal civilized measures of life's necessities require  
16 that no one ingest food that has been contaminated with feces.<sup>2</sup> Intentionally distributing food  
17 known to have been contaminated with fecal matter qualifies as disregarding a substantial risk of  
18 serious harm to the inmates who received the food.

19 There are two requirements for allegations to be accepted as true: "First, to be entitled to  
20 the presumption of truth, allegations in a complaint or counterclaim may not simply recite the  
21 elements of a cause of action, but must contain sufficient allegations of underlying facts to give  
22 fair notice and to enable the opposing party to defend itself effectively. Second, the factual  
23 allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not  
24 unfair to require the opposing party to be subjected to the expense of discovery and continued  
25 litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Plaintiff's allegations that,

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27 <sup>2</sup> It matters not whether the fecal matter was of human origin as stated in Plaintiff's allegations (Doc. 1, p. 4-5), or  
28 aviary as reflected in the exhibits to the Complaint (Doc. 1, pp. 21-22). Any form of known fecal matter in food  
suffices to fall below the minimal civilized measures of life's necessities.

1 despite the obvious stench, Morales ordered inmates to unload the truck and push the carts of  
2 food into the building for inmate consumption, states a cognizable claim for deliberate  
3 indifference. Likewise, Plaintiff's allegation that Officer Ruelas ordered inmates to clean the  
4 feces off the carts and lunch boxes, for distribution to the inmates, also states a cognizable  
5 deliberate indifference claim. Finally, Plaintiff's allegations that Officer Curry spoke to the  
6 inmate porters and instructed them not to tell other inmates that the food distributed to them had  
7 been contaminated with feces also states a cognizable claim for deliberate indifference to the  
8 inmates who received it.

9 **2. Fourteenth Amendment**

10 **a. Due Process**

11 **(1) Procedural**

12 The Fourteenth Amendment's Due Process Clause protects persons against deprivations  
13 of life, liberty, or property; and those who seek to invoke its procedural protection must establish  
14 that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Plaintiff  
15 has not alleged any facts that would support a claim that he was deprived of a protected interest  
16 without procedural due process.

17 **(2) Substantive**

18 "To establish a violation of substantive due process . . . , a plaintiff is ordinarily required  
19 to prove that a challenged government action was clearly arbitrary and unreasonable, having no  
20 substantial relation to the public health, safety, morals, or general welfare. Where a particular  
21 amendment provides an explicit textual source of constitutional protection against a particular  
22 sort of government behavior, that Amendment, not the more generalized notion of substantive due  
23 process, must be the guide for analyzing a plaintiff's claims." *Patel v. Penman*, 103 F.3d 868,  
24 874 (9th Cir. 1996) (citations, internal quotations, and brackets omitted), *cert. denied*, 520 U.S.  
25 1240 (1997); *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Plaintiff has not alleged  
26 any facts that would support a claim that his rights under the substantive component of the Due  
27 Process Clause were violated.

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1                                   **3.     Supervisory Liability**

2           Plaintiff alleges that Warden Sherman, Associate Warden Reynoso, and Captain Marsh  
3 contributed to “a systematic pattern of events by failure to protect inmates from the spread of  
4 H.Pylori which is transmitted by fecal matter.” Generally, supervisory personnel are not liable  
5 under section 1983 for the actions of their employees under a theory of *respondeat superior*;  
6 therefore, when a named defendant holds a supervisory position, the causal link between him and  
7 the claimed constitutional violation must be specifically alleged. *See Iqbal*, 556 U.S. at 677;  
8 *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th  
9 Cir. 1978), cert. denied, 442 U.S. 941 (1979). “In a § 1983 suit or a *Bivens* action - where  
10 masters do not answer for the torts of their servants - the term ‘supervisory liability’ is a  
11 misnomer.” *Iqbal*, 556 U.S. at 677.

12           However, a supervisor can be liable for his own culpable act of refusing to terminate a  
13 series of acts by others that the supervisor knew or should have known would cause a  
14 constitutional violation. *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2010). To state a claim  
15 for deliberate indifference, Plaintiff must allege some facts that would support a claim that  
16 supervisory defendants either personally participated in the alleged deprivation of constitutional  
17 rights; knew of the violations and failed to act to prevent them; or promulgated or “implemented a  
18 policy so deficient that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the  
19 moving force of the constitutional violation.’” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.  
20 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). An  
21 unconstitutional policy cannot be proved by a single incident “unless proof of the incident  
22 includes proof that it was caused by an existing, unconstitutional policy.” *City of Oklahoma City*  
23 *v. Tuttle*, 471 U.S. 808, 823-24 (1985); a single incident supplies a “policy” only when the  
24 decision-maker has “final authority” to establish the policy in question. *Collins v. City of San*  
25 *Diego*, 841 F.2d 337, 341 (9th Cir. 1988), citing *Pembauer v. City of Cincinnati*, 475 U.S. 469  
26 (1986). Plaintiff alleges no such facts here.

27           As set forth above, “bare assertions . . . amount[ing] to nothing more than a “formulaic  
28 recitation of the elements” of a constitutional discrimination claim,’ for the purposes of ruling on

1 a motion to dismiss [and thus also for screening purposes], are not entitled to an assumption of  
2 truth.” *Moss*, 572 F.3d at 969 (quoting *Iqbal*, 556 U.S. at 1951 (quoting *Twombly*, 550 U.S. at  
3 555)). “Such allegations are not to be discounted because they are ‘unrealistic or nonsensical,’  
4 but rather because they do nothing more than state a legal conclusion -- even if that conclusion is  
5 cast in the form of a factual allegation.” *Id.* Thus, any allegation that supervisory personnel are  
6 somehow liable solely based on the acts of those under his or her supervision does not state a  
7 cognizable claim. Plaintiff fails to state allegations to establish that Warden Sherman, Associate  
8 Warden Reynoso, or Captain Marsh knew that food contaminated with fecal matter was being  
9 distributed to the inmates on March 12, 2017, or that any policy was in place which allowed this  
10 to occur.

#### 11 **4. Plaintiff’s Motion to Appoint Counsel**

12 On December 22, 2017, Plaintiff filed a motion seeking the appointment of counsel.  
13 (Doc. 10.) Plaintiff does not have a constitutional right to appointed counsel in this action, *Rand*  
14 *v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), and the Court cannot require an attorney to  
15 represent Plaintiff pursuant to 28 U.S.C. § 1915(e)(1). *Mallard v. United States District Court for*  
16 *the Southern District of Iowa*, 490 U.S. 296, 298 (1989). However, in certain exceptional  
17 circumstances the Court may request the voluntary assistance of counsel pursuant to section  
18 1915(e)(1). *Rand*, 113 F.3d at 1525.

19 Without a reasonable method of securing and compensating counsel, the Court will seek  
20 volunteer counsel only in the most serious and exceptional cases. In determining whether  
21 “exceptional circumstances exist, the district court must evaluate both the likelihood of success of  
22 the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the  
23 complexity of the legal issues involved.” *Id.* (internal quotation marks and citations omitted).

24 Plaintiff states that he has the mentality of a 3 year old child and a tab score of 0.0. He  
25 states that he has only been able to file his documents in this case with the assistance of another  
26 inmate, Christopher Scott Rider. Plaintiff has stated cognizable claims upon which he may  
27 proceed and it appears the assistance of counsel is justified in this action. Thus, Plaintiff’s motion  
28 to appoint counsel is GRANTED. The Court will attempt to locate counsel to represent Plaintiff.



1 No action is required of Plaintiff in this action until the Court either locates counsel willing to  
2 represent Plaintiff, or informs Plaintiff of an inability to do so.

3 **ORDER**

4 Plaintiff is not required to file any response to this order at this time. Deadlines for a  
5 response to this order will be set at a later time depending on whether counsel willing to represent  
6 Plaintiff is located.

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8 IT IS SO ORDERED.

9 Dated: **February 22, 2018**

10 /s/ Sheila K. Oberto  
11 UNITED STATES MAGISTRATE JUDGE  
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