

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD WIMBERLY,

Plaintiff,

Civ. No. S-07-2312 JAM KJM F

VS.

ARNOLD SCHWARZENEGGER, et al.

## Defendants.

## ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed May 30, 2008, plaintiff's amended complaint was dismissed with leave to file a second amended complaint. Plaintiff has now filed a second amended complaint.

As previously noted, the court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

11111

1           A claim is legally frivolous when it lacks an arguable basis either in law or in  
2 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-  
3 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless.  
5 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however  
6 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d  
7 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227. A complaint, or portion thereof, should  
8 only be dismissed for failure to state a claim upon which relief may be granted if it appears  
9 beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would  
10 entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (1969).

11           Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and  
12 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
13 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell  
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007). A complaint must  
15 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain  
16 factual allegations sufficient “to raise a right to relief above the speculative level.” Id. However,  
17 “[s]pecific facts are not necessary; the statement [of facts] need only “give the defendant fair  
18 notice of what the . . . claim is and the grounds upon which it rests.”” Erickson v. Pardus, 551  
19 U.S. 89, 127 S.Ct. 2197 (2007). In reviewing a complaint under this standard, the court must  
20 accept as true the allegations of the complaint, id., and construe the pleading in the light most  
21 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

22           Plaintiff alleges that he is being housed in a facility which has converted the areas  
23 formerly used for recreation into a room for bunks and which houses two people in a cell  
24 designed for a single man, but which has not added sufficient toilet facilities for the additional  
25 population. He alleges that the over-crowding “hinders [his] mental, physical, and emotional  
26 well-being and does put [his] life at . . . greater risk than previously.” Amended Complaint at 3.

1       In Rhodes v. Chapman, 452 U.S. 337, 348 (1981), the Supreme Court held that  
2 double-celling by itself did not constitute cruel and unusual punishment; in the case before it, the  
3 overcrowding in the prison had not led to “deprivations of essential food, medical care or  
4 sanitation” and did not “increase violence among inmates or create other conditions intolerable  
5 for prison confinement.” These conclusions were echoed in Wilson v. Seiter, where the Court  
6 found that

7       *Some* conditions of confinement may establish an Eighth  
8 Amendment violation “in combination” when each would not do  
9 so alone, but only when they have a mutually enforcing effect that  
10 produces the deprivation of a single, identifiable human need such  
11 as food, warmth, or exercise—for example, a low cell temperature  
12 at night combined with a failure to issue blankets. . . . To say that  
some prison conditions may interact in this fashion is a far cry  
from saying that all prison conditions are a seamless web for  
Eighth Amendment purposes. Nothing so amorphous as “overall  
conditions” can rise to the level of cruel and unusual punishment  
when no specific deprivation of a single human need exists.

13 501 U.S. 294, 304-05 (1991) (emphasis in original).

14       In his second amended complaint, plaintiff describes the overcrowding generally  
15 and describes his fears of violence, but he does not suggest, for example, that the use of the day  
16 room as a dormitory has deprived him of exercise or that the strain placed on the toilet facilities  
17 has caused sanitation problems. Moreover, this pleading, which is not on the court’s form, does  
18 not name any defendants.

19       The court has determined that the second amended complaint does not contain a  
20 short and plain statement as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules  
21 adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the  
22 claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir.  
23 1984). Plaintiff must allege with at least some degree of particularity overt acts which  
24 defendants engaged in that support plaintiff’s claim. Id. Because plaintiff has failed to comply  
25 with the requirements of Fed. R. Civ. P. 8(a)(2), the second amended complaint must be  
26 dismissed. The court will, however, grant leave to file a third amended complaint.

1           If plaintiff chooses to file a third amended complaint, plaintiff must demonstrate  
2 how the conditions complained of have resulted in a deprivation of plaintiff's constitutional  
3 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the third amended complaint  
4 must allege in specific terms how each named defendant is involved. There can be no liability  
5 under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a  
6 defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v.  
7 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.  
8 1978). Furthermore, vague and conclusory allegations of official participation in civil rights  
9 violations are not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

10           In addition, plaintiff is informed that the court cannot refer to a prior pleading in  
11 order to make plaintiff's third amended complaint complete. Local Rule 15-220 requires that an  
12 amended complaint be complete in itself without reference to any prior pleading. This is  
13 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
14 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a third amended complaint, the  
15 original pleading no longer serves any function in the case. Therefore, in a third amended  
16 complaint, as in an original complaint, each claim and the involvement of each defendant must  
17 be sufficiently alleged.

18           In accordance with the above, IT IS HEREBY ORDERED that:

19           1. Plaintiff's second amended complaint is dismissed;

20           2. Within thirty days from the date of this order, plaintiff shall return an  
21 original and one copy of the third amended complaint to the court. This third amended  
22 complaint shall comply with the requirements of the Civil Rights Act, the Federal Rules of Civil  
23 Procedure, and the Local Rules of Practice; the third amended complaint must bear the docket  
24 number assigned this case and must be labeled "Third Amended Complaint"; failure to file a  
25 third amended complaint in accordance with this order will result in a recommendation that this  
26 action be dismissed; and

1           3. The Clerk of the Court is directed to send plaintiff the form for a civil rights  
2 action by a prisoner.

3 DATED: January 21, 2009.

4   
5 U.S. MAGISTRATE JUDGE

6  
7           2  
8 wimb2312,14am  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26