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

DANIEL P. BJORLIN,

Plaintiff,

No. CIV S-09-1793 GEB GGH P

vs.

T. HUBBARD, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

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Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion for injunctive relief, filed on January 27, 2010, to which, although no defendant had yet been served, this court ordered a response by two of the named defendants, Callison (spelled as Calison in the order) and McDonald, within seven days, by Order, filed on February 4, 2010 (docket # 15).<sup>1</sup> which response was timely filed on February 16, 2010 (docket # 20) by the Attorney-General’s Office.

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<sup>1</sup> The court directed the Court Clerk to serve the motion for preliminary injunctive relief upon the Attorney General’s Office as well as upon defendants Callison and McDonald and, in addition to a response, ordered the Attorney General and defendants to ascertain plaintiff’s safety and take any necessary steps to assure his safety. See docket # 15.

1 TRO/Motion for Preliminary Injunction

2 As the court stated in its Order, filed on February 4, 2010 (docket # 15), plaintiff  
3 has brought a “motion for injunction relief,” which he apparently intends to be a motion for a  
4 temporary restraining order (TRO) or preliminary injunctive relief, declaring that he is in fear for  
5 his life and that his life has been threatened. Motion, pp. 1-2.

6 TRO

7 The purpose in issuing a temporary restraining order is to preserve the status quo  
8 pending a fuller hearing. The cases contain limited discussion of the standards for issuing a  
9 temporary restraining order due to the fact that very few such orders can be appealed prior to the  
10 hearing on a preliminary injunction. It is apparent, however, that requests for temporary  
11 restraining orders which are not ex parte and without notice are governed by the same general  
12 standards that govern the issuance of a preliminary injunction.<sup>2</sup> See New Motor Vehicle Bd. v.  
13 Orrin W. Fox Co., 434 U.S. 1345, 1347 n.2 (1977) (Rehnquist, J.); Los Angeles Unified Sch.  
14 Dist. v. United States Dist. Court, 650 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J. dissenting);  
15 Century Time Ltd. v. Interchron Ltd., 729 F. Supp. 366, 368 (S.D.N.Y. 1990). In many cases the  
16 emphasis of the court is directed to irreparable harm and the balance of hardships because the  
17 merits of a controversy are often difficult to ascertain and adjudicate on short notice.

18 Preliminary Injunction Standard

19 “The proper legal standard for preliminary injunctive relief requires a party to  
20 demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm  
21 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

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23 <sup>2</sup> To the extent that this purports to be an ex parte motion for a TRO without notice, the  
24 undersigned notes that there are stringent requirements to be imposed under Fed. R. Civ. P. 65 for  
25 issuance of such an order, which plaintiff clearly has not met. Reno Air Racing Ass’n, Inc. v.  
26 McCord, 452 F.3d 1126, 1131 (9<sup>th</sup> Cir. 2006). Rule 65(b) permits issuance of a TRO without “notice  
to the adverse party or its attorney, only if: (A) specific facts in an affidavit or a verified complaint  
clearly show that immediate and irreparable injury...will result to the movant before the adverse party  
can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made to  
give notice and the reasons why it should not be required.”

1 injunction is in the public interest.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9<sup>th</sup> Cir.  
2 2009), quoting Winter v. Natural Res. Def., quoting Winter v. Natural Res. Def. Council, Inc.,  
3 \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 375-76 (2008).

4 In cases brought by prisoners involving conditions of confinement, any  
5 preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the  
6 harm the court finds requires preliminary relief, and be the least intrusive means necessary to  
7 correct the harm.” 18 U.S.C. § 3626(a)(2).

8 Underlying Allegations

9 As the court has previously observed, in his underlying amended complaint, filed  
10 on October 22, 2009 (docket # 12), plaintiff alleges, inter alia, violations by defendants of his  
11 rights under the Eighth Amendment by failing to protect him from a sexual assault by a cellmate,  
12 on September 22, 2009, with whom he was placed by defendant Callison<sup>3</sup> (whom plaintiff  
13 actually alleges set plaintiff up to be injured), and by showing indifference to his concerns  
14 thereafter. Amended Complaint, pp. 7-9. Plaintiff also makes claims of retaliation under the  
15 First Amendment: plaintiff alleges that after he had been raped, defendant Callison told him that  
16 the next time he got a cellmate, he (plaintiff) would not be walking out of his cell but would  
17 come out in a body bag for “snitching” against defendant Callison’s partner (apparently, by  
18 having filed a grievance relating to defendant Hubbard’s alleged harassment of plaintiff). *Id.*, at  
19 5-7. When, on September 25, 2009, plaintiff witnessed defendants Swart and Mortell “beat and  
20 punch another inmate in the face,” plaintiff was threatened by them to keep silent or he might be  
21 hurt. *Id.*, at 7-8. Plaintiff was so frightened that he informed a non-defendant social worker, Mr.  
22 Marrow, about what had happened and he called defendant Perez. *Id.*, at 8. On September 30,  
23 2009, defendant C/O Rainey wrote plaintiff up on a CDC-115 rules violation report (RVR) for  
24 obstructing a peace officer by refusing to accept assigned housing, stating that he did not care

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26 <sup>3</sup> Plaintiff has introduced various spellings of this name; the court takes the spelling from  
defendant Callison’s own declaration. See Callison Declaration, Docket # 20-3.

1 about plaintiff's fears of being assigned an incompatible cellmate, even after plaintiff told him  
2 that he had been the victim of a sexual assault eight days earlier and that the cellmate officials  
3 planned to put in his cell was one with whom he had had a previous physical altercation. *Id.*, at  
4 8-9. Plaintiff told Rainey he had even gone on suicide watch because officers had not wanted to  
5 move either one of them. *Id.*, at 9. Although defendant Perez had granted his 602, he made no  
6 attempt to protect plaintiff. *Id.* Plaintiff also alleges that defendants Cummings, Lockhart and  
7 Fannon, inter alia, failed to investigate his claims and to protect him. *Id.*, at 16-17. Plaintiff  
8 seeks money damages. *Id.*, at 11.

9 *Motion*

10 In his preliminary injunctive relief motion, plaintiff, who identifies himself as a  
11 mental health patient in fear for his life, states, under penalty of perjury, that defendants have  
12 tampered with his meals and deprived of him of access to showers and law library books; he  
13 states emphatically that defendant Callison set him up to be raped by his cellmate, on September  
14 20, 2009, an allegation he makes in the underlying amended complaint<sup>4</sup> and reiterates defendant  
15 Callison's alleged warning to him that he would come out of his cell next time in a body bag.  
16 Motion, p. 2. Plaintiff further states that on January 18, 2010, he and his cellmate, named  
17 Johnson (presumably a different cellmate from the one who allegedly raped plaintiff), had their  
18 lives seriously threatened. *Id.* Plaintiff states that "higher officials" have failed to take action to  
19 ameliorate the situation and that he is suffering retaliation due to his having filed a 602 grievance  
20 and a lawsuit against defendant Hubbard (by which it is unclear whether he means the instant  
21 lawsuit, wherein he sued many defendants, including Hubbard, or a different one). *Id.*

22 Plaintiff claims that on January 18, 2010, two correctional officers (C/O's),  
23 defendant Callison as well as T. Smith, a non-party, both threatened the lives of plaintiff and his  
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25 <sup>4</sup> There is, however, a discrepancy as to the date plaintiff identifies within his amended  
26 complaint, September 22, 2009, and the date he claims within his motion, September 20, 2009, as  
the day on which he was sexually assaulted.

1 cellmate, Joseph Johnson, (apparently one with whom he has no problem being housed with)  
2 stating that they were going to be separated and killed or set up to be murdered. Motion, p. 3.  
3 Plaintiff avers that both defendant C/O Callison and non-defendant C/O Smith have assaulted  
4 him on “numerous occasions” and have tampered with his food. Id., at 3-4. Plaintiff is seeking  
5 an immediate transfer from HDSP and cautions that if he should wind up injured or dead, any  
6 such event will have been orchestrated by defendant Callison and non-party Smith and permitted  
7 by defendant McDonald and a non-defendant associate warden named Davey. Id., at 2, 4.  
8 Plaintiff makes his assertions under penalty of perjury. Id., at 4.

9           On February 5, 2010 (docket # 18), plaintiff filed a document he entitled a  
10 declaration but which he failed to sign at all, much less under penalty of perjury. Within this  
11 defective document, plaintiff again asserts his desire to be transferred to a “safer facility,” or  
12 alternatively to be put into federal protective custody. Docket # 18, p. 1. He continues to  
13 complain of HDSP ASU SNY inmates being forced to be housed with incompatible cellmates.  
14 Id., at 2. Plaintiff references again the alleged sexual assault to which he claims to have been  
15 subjected on September 20, 2009. Id., at 2-3. He refers, as well, to the alleged incident on  
16 January 18, 2010, this time adding that when C/O Smith and defendant Callison spoke to  
17 plaintiff’s cellmate, Johnson, as he returned to the cell, non-party Smith is supposed to have said  
18 to Johnson: “Nigger, I will kill you! I will have you hanging in a cell in Z unit like that nigger  
19 they found on Christmas.” Id., at 4. Plaintiff again reiterates that Smith and defendant Callison  
20 have threatened to kill him “on many occasions,” and that he is in the mental health program and  
21 turning to the courts for help as he trusts no one where he is. Id.

22           Response/Opposition

23           The February 16, 2010 (docket # 20), response by the Office of the Attorney  
24 General points out that no defendants have yet been served and no waiver is intended by its  
25 special appearance. Response (Resp.), p. 1, note 1. The Attorney General’s Office has  
26 determined that plaintiff had been housed in the HDSP Administrative Segregation Unit (ASU)

1 originally on October 21, 2009, for being in possession of a weapon; plaintiff was found guilty  
2 on the RVR for a weapons violation on February 3, 2009, and assessed a 360-day credit loss and  
3 a ten-month Security Housing Unit (SHU) term. Resp., pp. 1-2, citing Declaration (Dec.) of R.  
4 Dreith, HDSP Litigation Coordinator ¶ 2. A Classification Services Representative (CSR)  
5 approved a ten-month SHU term for plaintiff on March 30, 2009, with a June 6, 2009, release  
6 date. Resp., p. 2, Dreith Dec., ¶ 3. Plaintiff was referred for non-adverse transfer to the Sensitive  
7 Needs Yard (SNY) of California State Prison-Lancaster (CSP-LAC), on September 10, 2009, due  
8 to safety concerns on the HDSP B SNY, but the CSR endorsement expired on February 3, 2010.  
9 Resp., p. 2, Dreith Dec., ¶ 4.<sup>5</sup>

10 When, on January 28, 2010, plaintiff was scheduled to appear at the Institutional  
11 Classification Committee (ICC) for a referral back to the CSR to endorse a transfer to either the  
12 CSP-LAC SNY or Pleasant Valley State Prison's (PVSP) SNY, plaintiff refused to attend the  
13 hearing, according to declarant R. Dreith, and the hearing was held with plaintiff in absentia.  
14 Dreith Dec., ¶ 5. The ICC recommended plaintiff's case be referred to the CSR with a  
15 recommendation for transfer to the SNY at PVSP or CSP-LAC. Id.

16 According to Litigation Coordinator Dreith, although plaintiff is currently  
17 awaiting his transfer, he was moved from his housing in Unit D7 to Unit D6, in an abundance of  
18 caution on February 11, 2010, with the aim of ensuring the safety of both plaintiff and the staff  
19 he has accused of threatening him. Id., at ¶ 6.

20 Finally, declarant Dreith avers that an investigation into plaintiff's allegations of  
21 rape by a former cellmate was conducted on September 20, 2009, by the HDSP Investigative  
22 Services Unit and has been completed. Id., at ¶ 7. Dreith states that the investigation showed  
23 plaintiff to be less than cooperative, failing to provide specific details of the incident; the  
24 investigating officer felt that plaintiff may have been attempting to manipulate staff with false

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25 <sup>5</sup> Dreith refers to CSP-LAC as California State Prison, Los Angeles County, but the Attorney  
26 General apparently correctly refers to it as California State Prison-Lancaster.

1 sexual assault allegations to obtain a cell move or a transfer from HDSP. Id.

2 In a separate declaration, defendant C/O E. Callison denies that he assaulted  
3 plaintiff or set him up to be raped or that he has ever threatened or assaulted any inmate.  
4 Callison Dec., ¶¶ 2-3. He further declares that, while he has the authority to initiate bed or cell  
5 moves, that all potential cellmates are screened for compatibility by an officer, sergeant or  
6 lieutenant and prospective cellmates must sign a chrono indicating they can be suitably housed  
7 together. Id., at ¶ 4. Further, all moves must be approved and authorized by the unit sergeant or  
8 lieutenant, according to declarant Callison. Id.

9 *Plaintiff's Further Filing*

10 In motion for an extension of time, filed on February 18, 2010 (docket # 21),  
11 which the court will address hereafter, plaintiff attaches a 602 grievance he and his cellmate,  
12 Johnson, evidently filed on February 15, 2010. The grievance confirms by plaintiff his move  
13 from D-7 to D-6 that the Attorney General's response indicated had occurred on February 11,  
14 2010. In the grievance, plaintiff apparently means to assert that his troubles have not been  
15 resolved by the move. He claims that defendant Swart, on the same day as the move, February  
16 11, 2010, left D-7 to come to D-6, whereupon he destroyed legal documents intended for court  
17 belonging to Johnson<sup>6</sup> and himself, as well as Johnson's personal property, in retaliation for the  
18 instant lawsuit, the pending motion, and/or other legal matters. Defendant Swart stated: "this is  
19 not over, it's just the beginning....," according to plaintiff's grievance. The next day, February 12,  
20 2010, defendant Swart again came from D-7 to D-6, at the time of breakfast tray pick up and  
21 asked plaintiff and Johnson if they liked the "special trays" he had made for them. Half an hour  
22 later defendant Swart and a non-defendant C/O named Marshall came and told plaintiff and  
23 Johnson to put on handcuffs for a cell search. They refused because they did not want the rest of  
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25 <sup>6</sup> Plaintiff makes frequent reference in his administrative grievance to an inmate named  
26 Johnson, evidently his current cellmate, as another plaintiff or as a co-plaintiff in this action, but  
there is no basis for this. This matter is proceeding with Daniel Bjorlin as the sole plaintiff.

1 their property to be destroyed by defendant Swart. When a non-party Correctional Sgt. Lowther  
2 came to ask them to cuff up for a property search, they explained what had happened the day  
3 before; Lowther told defendant Swart to leave D-6, after which Johnson and plaintiff complied  
4 with the cell search (which apparently proceeded without further incident). Plaintiff in his  
5 grievance claims that his “psych doctor” Sloan said he was aware of the threats and harassment  
6 plaintiff has been experiencing.

7 Conclusion

8 While plaintiff does appear to be seeking preliminary injunctive relief in his  
9 motion for an injury or potential injury that bears the necessary relationship to the conduct  
10 asserted in the underlying amended complaint, Devose v. Herrington, 42 F.3d 470, 471 (8<sup>th</sup> Cir.  
11 1994), *per curiam*,<sup>7</sup> plaintiff is hampered in proceeding on his motion by failing to make clear  
12 that he seeks injunctive relief within the instant complaint. Moreover, based on both the  
13 response by the Attorney General’s Office and on plaintiff’s own representation, it appears that  
14 plaintiff has been moved from the immediate sphere of defendant Callison of whom he  
15 complains most vociferously within his motion. Further, it appears that plaintiff is to be  
16 transferred to another facility in the near future. While it is difficult to assess at this stage  
17 plaintiff’s likelihood of success on the merits, the court finds in the most current circumstances  
18 that he has not made an adequate showing that he is likely to suffer irreparable harm in the  
19 absence of preliminary injunctive relief, even were he to amend the relief he seeks to include  
20 injunctive relief in the underlying action. Nor does the court find that in light of his recent move  
21 and apparently imminent transfer that the balance of equities tips in his favor, and that an  
22 injunction would be in the public interest. The motion should be denied.

23 Motion for Extension of Time

24 Plaintiff has also asked for an extension of time to submit the ten amended

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26 <sup>7</sup> Cited in Anaya v. Campbell, 2009 WL 425034 \*1 (E.D. Cal 2009); Houser v. Grant-Ellis,  
2010 WL 432327 \*1 (D. Ariz. Feb. 2, 2010).



1 complaint copies, pursuant to the Order, filed on February 4, 2010 (docket # 14), as well as six  
2 additional USM-285 forms. Motion, filed on February 18, 2010 (docket # 21). Plaintiff  
3 contends that, as a form of retaliation by defendant Swart and unnamed others, he is being  
4 restricted to making two copies of the amended complaint a week. *Id.*, at 2. He also states that  
5 defendant Swart destroyed legal forms and documents related to the instant case. *Id.* The court  
6 has previously referenced the contents of the 602 inmate appeal form that he filed on February  
7 15, 2010, claiming that defendant Swart destroyed his legal work and personal property (as well  
8 as that of another inmate named Johnson) in anger because of plaintiff's having sought a  
9 "restraining order" in this case. *Id.*, at 3. The court will grant plaintiff's requests for an extension  
10 of time and additional forms on this occasion.

11 Accordingly, IT IS HEREBY ORDERED that:

12 1. Plaintiff's request for an extension of time to return the forms and copies of the  
13 amended complaint necessary for the court to direct service of process and his request for six  
14 additional USM-285 forms, filed on February 18, 2010 (docket # 21), are both granted;

15 2. Plaintiff is granted until March 31, 2010, to return the requisite copies and  
16 forms as set forth in the court's order of February 4, 2010 (docket # 14); and

17 3. The Clerk of the Court is directed to provide plaintiff with six additional USM-  
18 285 forms.

19 4. In addition, the Clerk of the Court must serve a copy of this Order and these  
20 Findings and Recommendations upon Supervising Deputy Attorney General Monica Anderson.

21 IT IS RECOMMENDED that plaintiff's motion for preliminary injunctive relief,  
22 filed on January 27, 2010 (docket # 13), be denied.

23 These findings and recommendations are submitted to the United States District  
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
25 one days after being served with these findings and recommendations, any party may file written  
26 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections  
2 shall be served and filed within seven days after service of the objections. The parties are  
3 advised that failure to file objections within the specified time may waive the right to appeal the  
4 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: February 26, 2010

/s/ Gregory G. Hollows

6 UNITED STATES MAGISTRATE JUDGE

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