

1  
2  
3  
4  
5  
6  
7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 BRYANT ALLEN,

11 Plaintiff,

No. CIV S-09-3068 JAM KJM P

12 vs.

13 S.M. ROCHE, et al.,

14 Defendants.

ORDER

15 \_\_\_\_\_/  
16 Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42  
17 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C.  
18 § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C.  
19 § 636(b)(1).

20 Plaintiff has submitted a declaration that makes the showing required by 28  
21 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

22 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28  
23 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$5.58 will be assessed by this  
24 order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to  
25 collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the  
26 Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be  
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's  
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief  
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised  
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may  
8 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28  
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in  
11 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-  
12 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
13 indisputably meritless legal theory or where the factual contentions are clearly baseless.  
14 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however  
15 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d  
16 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

17 In order to avoid dismissal for failure to state a claim a complaint must contain  
18 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements  
19 of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other  
20 words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
21 statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
22 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.  
23 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
24 draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129  
25 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be  
26 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200

1 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.  
2 Rhodes, 416 U.S. 232, 236 (1974).

3 Plaintiff has filed two complaints. The amended complaint which is currently  
4 before the court refers the reader to attached pages for the nature of the claim; no such pages  
5 were attached. There is nothing to construe. Plaintiff's amended complaint must be dismissed.  
6 The court will, however, grant leave to file a second amended complaint.

7 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
8 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
9 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
10 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless  
11 there is some affirmative link or connection between a defendant's actions and the claimed  
12 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.  
13 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
14 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
15 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

23 Plaintiff has requested the appointment of counsel. The United States Supreme  
24 Court has ruled that district courts lack authority to require counsel to represent indigent  
25 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In  
26 certain exceptional circumstances, the court may request the voluntary assistance of counsel

1 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);  
2 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court  
3 does not find the required exceptional circumstances. Plaintiff's motion for the appointment of  
4 counsel will therefore be denied.

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

6 1. Plaintiff's request for leave to proceed in forma pauperis (docket no. 11) is  
7 granted.

8 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.  
9 Plaintiff is assessed an initial partial filing fee of \$5.58. All fees shall be collected and paid in  
10 accordance with this court's order to the Director of the California Department of Corrections  
11 and Rehabilitation filed concurrently herewith.

12 3. Plaintiff's amended complaint is dismissed.

13 4. Plaintiff is granted thirty days from the date of service of this order to file a  
14 second amended complaint that complies with the requirements of the Civil Rights Act, the  
15 Federal Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must  
16 bear the docket number assigned this case and must be labeled "Amended Complaint"; failure to  
17 file an amended complaint in accordance with this order will result in a recommendation that this  
18 action be dismissed.

19 5. The Clerk of the Court is directed to send plaintiff the form for a civil rights  
20 action by a prisoner.

21 6. Plaintiff's motion for the appointment of counsel (docket no. 13) is denied.

22 DATED: April 27, 2010.

23   
24 U.S. MAGISTRATE JUDGE