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

ARMANDO HERRERA,

Plaintiff,

No. CIV S-10-1744 EFB P

vs.

GARDNER, et al.,

Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Armando Herrera, an inmate confined at California Medical Facility, filed this pro se civil rights action under 42 U.S.C. § 1983. In addition to filing a complaint, he has filed an application to proceed in forma pauperis, two letters, and a motion for a temporary restraining order against CDCR staff. *See* Dckt. Nos. 2, 6-9. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

**I. Request to Proceed In Forma Pauperis**

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. No. 2. Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

1 **II. Screening Order**

2 Pursuant to 28 U.S.C. § 1915A, the court shall review “a complaint in a civil action in  
3 which a prisoner seeks redress from a governmental entity or officer or employee of a  
4 governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify cognizable  
5 claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous,  
6 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief  
7 from a defendant who is immune from such relief.” *Id.* § 1915A(b).

8 A district court must construe a pro se pleading “liberally” to determine if it states a  
9 claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
10 opportunity to cure them. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). While  
11 detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a cause of  
12 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct.  
13 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff  
14 must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
15 plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570).

16 A claim has facial plausibility when the plaintiff pleads factual content that allows  
17 the court to draw the reasonable inference that the defendant is liable for the  
18 misconduct alleged. The plausibility standard is not akin to a “probability  
19 requirement,” but it asks for more than a sheer possibility that a defendant has  
acted unlawfully. Where a complaint pleads facts that are merely consistent with  
a defendant’s liability, it stops short of the line between possibility and  
plausibility of entitlement to relief.

20 *Id.* (citations and quotation marks omitted). Although legal conclusions can provide the  
21 framework of a complaint, they must be supported by factual allegations, and are not entitled to  
22 the assumption of truth. *Id.* at 1950.

23 The Civil Rights Act under which this action was filed provides:

24 Every person who, under color of [state law] . . . subjects, or causes to be  
25 subjected, any citizen of the United States . . . to the deprivation of any rights,  
26 privileges, or immunities secured by the Constitution . . . shall be liable to the  
party injured in an action at law, suit in equity, or other proper proceeding for  
redress . . . .

1 42 U.S.C. § 1983. An individual defendant is not liable on a civil rights claim unless the facts  
2 establish the defendant's personal involvement in the constitutional deprivation or a causal  
3 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.  
4 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44  
5 (9th Cir. 1978).

6 The court has reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and finds it  
7 does not state a cognizable claim. Plaintiff's complaint states that in 2006 he had a parole  
8 hearing and was denied parole for five years, so that the next hearing would be in 2011. Compl.,  
9 Dckt. No. 1 at 3. He claims that in 2009 the board of parole terms held a hearing without him  
10 being there. He asks that he be granted a parole date and released. As discussed below, a  
11 challenged to the parole determination may not be asserted by way of § 1983 claim.

12 Plaintiff's claims challenge the validity of his current incarceration. Such a claim might  
13 properly be brought in a habeas petition, but not in this § 1983 action. The Supreme Court has  
14 held that "a state prisoner's § 1983 action is barred (absent prior invalidation)--no matter the  
15 relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state  
16 conduct leading to conviction or internal prison proceedings)--if success in that action would  
17 necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544  
18 U.S. 74, 81-82 (2005) (emphasis added); *see also Edwards v. Balisok*, 520 U.S. 641 (1997);  
19 *Heck v. Humphrey*, 512 U.S. 477 (1994). Were plaintiff to succeed on his claims that his parole  
20 hearing was conducted unconstitutionally, those findings would necessarily implicate the  
21 validity of plaintiff's sentence and current incarceration. *See Heck*, 512 U.S. at 487. Plaintiff  
22 has not demonstrated that his sentence and/or release date has previously been invalidated.  
23 Thus, his complaint does not state a claim for relief and must be dismissed.

24 Plaintiff also seeks a temporary restraining order ("TRO"). The standards for a TRO are  
25 essentially the same as that for a preliminary injunction. To be entitled to preliminary injunctive  
26 relief, a party must demonstrate "that he is likely to succeed on the merits, that he is likely to

1 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his  
2 favor, and that an injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109,  
3 1127 (9th Cir. 2009), citing *Winter v. Natural Res. Def. Council, Inc.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 365,  
4 374 (2008). The Ninth Circuit has also held that the “sliding scale” approach it applies to  
5 preliminary injunctions as it relates to the showing a plaintiff must make regarding his chances  
6 of success on the merits survives *Winter* and continues to be valid. *Alliance for Wild Rockies v.*  
7 *Cottrell*, \_\_\_ F.3d \_\_\_, 2010 WL 3665149, \*8 (amended September 28, 2010). Under this sliding  
8 scale the elements of the preliminary injunction test are balanced. As it relates to the merits  
9 analysis, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of  
10 likelihood of success on the merits. *Id.*

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

15 In this case, plaintiff has not met these requirements. His letters and motion state that his  
16 brother is a drop-out from a prison gang and that because of this he has been threatened by  
17 another inmate. He states that he requested protection from the prison staff, but that Sgt. Vierra  
18 said that he would not help plaintiff because plaintiff had filed a civil action against CDCR board  
19 members in Sacramento. He also states that Doctor Norrise told him that the correctional  
20 officers were planning to put someone violent in his cell so that they would beat him up.  
21 Plaintiff requests help from the court. But the issues raised in this motion do not appear to relate  
22 in any way to the issues raised in his complaint challenging the denial of parole. Thus, he has  
23 not in any way shown a likelihood of success on the merits of his complaint or even that serious  
24 questions have been raised.

25 However, unlike his attempt to challenge a denial of parole, the allegations contained in  
26 plaintiff’s letters and pleadings may form the basis for a civil rights claim. Thus, to proceed,

1 plaintiff must file an amended complaint. Any parole challenge must be presented in a proper  
2 habeas petition. Any attempt to litigate his allegations regarding the conditions of his  
3 confinement must be presented in a properly filed § 1983 claim.

4 Any amended complaint must adhere to the following requirements:

5 It must be complete in itself without reference to any prior pleading. E.D. Cal. Local  
6 Rule 220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended  
7 complaint, the original pleading is superseded.

8 It must show that the federal court has jurisdiction and that plaintiff's action is brought in  
9 the right place, that plaintiff is entitled to relief if plaintiff's allegations are true, and must  
10 contain a request for particular relief. Plaintiff must identify as a defendant only persons who  
11 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.  
12 *Johnson*, 588 F.2d at 743 (a person subjects another to the deprivation of a constitutional right if  
13 he does an act, participates in another's act or omits to perform an act he is legally required to do  
14 that causes the alleged deprivation).

15 It must contain a caption including the name of the court and the names of all parties.  
16 Fed. R. Civ. P. 10(a).

17 Plaintiff may join multiple claims if they are all against a single defendant. Fed. R. Civ.  
18 P. 18(a). If plaintiff has more than one claim based upon separate transactions or occurrences,  
19 the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b). Plaintiff may join  
20 multiple claims if they are all against a single defendant. Fed. R. Civ. P. 18(a). Unrelated claims  
21 against different defendants must be pursued in multiple lawsuits. "The controlling principle  
22 appears in Fed. R. Civ. P. 18(a): 'A party asserting a claim . . . may join, [] as independent or as  
23 alternate claims, as many claims . . . as the party has against an opposing party.' Thus multiple  
24 claims against a single party are fine, but Claim A against Defendant 1 should not be joined with  
25 unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in  
26 different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit

1 produce[s], but also to ensure that prisoners pay the required filing fees-for the Prison Litigation  
2 Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file  
3 without prepayment of the required fees. 28 U.S.C. § 1915(g).” *George v. Smith*, 507 F.3d 605,  
4 607 (7th Cir. 2007); *see also* Fed. R. Civ. P. 20(a)(2) (joinder of defendants not permitted unless  
5 both commonality and same transaction requirements are satisfied). Plaintiff may not change the  
6 nature of this suit by alleging new, unrelated claims in an amended complaint. *George*, 507 F.3d  
7 at 607 (no “buckshot” complaints).

8           The allegations must be short and plain, simple and direct and describe the relief plaintiff  
9 seeks. Fed. R. Civ. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v.*  
10 *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). A long, rambling pleading,  
11 including many defendants with unexplained, tenuous or implausible connection to the alleged  
12 constitutional injury or joining a series of unrelated claims against many defendants very likely  
13 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing  
14 plaintiff’s action pursuant to Rule 41 of the Federal Rules of Civil Procedure for violation of  
15 these instructions.

16           Plaintiff must sign the complaint. Fed. R. Civ. P. 11(a). By signing an amended  
17 complaint, plaintiff certifies he has made reasonable inquiry and has evidentiary support for his  
18 allegations and that for violation of this rule the court may impose sanctions sufficient to deter  
19 repetition by plaintiff or others. Fed. R. Civ. P. 11.

20           A prisoner may bring no § 1983 action until he has exhausted such administrative  
21 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. *Booth*  
22 *v. Churner*, 532 U.S. 731, 741 (2001). By signing an amended complaint plaintiff certifies his  
23 claims are warranted by existing law, including the law that he exhaust administrative remedies,  
24 and that for violation of this rule plaintiff risks dismissal of his entire action.

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1 Accordingly, the court hereby ORDERS that:

2 1. Plaintiff's request to proceed in forma pauperis is granted.

3 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in  
4 accordance with the notice to the Director of the California Department of Corrections and  
5 Rehabilitation filed concurrently herewith.

6 3. Plaintiff's request not to be housed in administrative segregation is denied. *See* Dckt.  
7 No. 7.

8 4. The complaint is dismissed with leave to amend within 30 days. The amended  
9 complaint must bear the docket number assigned to this case and be titled "First Amended  
10 Complaint." Failure to comply with this order will result in a recommendation that this action be  
11 dismissed. If plaintiff files an amended complaint stating a cognizable claim the court will  
12 proceed with service of process by the United States Marshal.

13 5. The Clerk is directed to randomly assign a district judge to this case.

14 Further, it is hereby RECOMMENDED that plaintiff's motion for a temporary  
15 restraining order, Dckt. No. 8, be denied.

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one  
18 days after being served with these findings and recommendations, any party may file written  
19 objections with the court and serve a copy on all parties. Such a document should be captioned  
20 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
21 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
22 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: October 18, 2010.

24   
25 EDMUND F. BRENNAN  
26 UNITED STATES MAGISTRATE JUDGE