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

JAMES EVANS, Jr.,

Plaintiff,

No. CIV S-10-2453 GGH P

vs.

EDMUND G. BROWN, Jr., et al.,

Defendants.

ORDER

_____ /

This action commenced on February 10, 2010, in the Northern District of California. However, only as of September 10, 2010, has the case been transferred to this court. This case has been construed as an action pursuant to 42 U.S.C. § 1983; the docket indicates that plaintiff, a state prisoner incarcerated at California State Prison - Corcoran, has had his request to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915, granted. Docket # 17. Plaintiff has consented to the jurisdiction of the undersigned. Docket # 29.

Plaintiff seeks to proceed not on the original filing dated February 10, 2010, but on a later incarnation, filed on March 24, 2010. Docket # 9. This court will construe the entry at docket # 9, denominated "complaint" to be an amended complaint filed by plaintiff, find that it supersedes the original and proceed to screen the amended complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967).

1 The court is required to screen complaints brought by prisoners seeking relief
2 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
3 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
4 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
5 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
6 U.S.C. § 1915A(b)(1),(2).

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

14 A complaint must contain more than a “formulaic recitation of the elements of a
15 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
16 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
17 “The pleading must contain something more...than...a statement of facts that merely creates a
18 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
19 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
20 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
21 v. Iqbal, No. 07-1015, 2009 WL 1361536 at * 12 (May 18, 2009) (quoting Twombly, 550 U.S. at
22 570, 127 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content
23 that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” Id.

25 In reviewing a complaint under this standard, the court must accept as true the
26 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.

1 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,
2 and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.
3 1843 (1969).

4 Plaintiff names as defendants in his amended complaint: California Attorney
5 General Edmund G. Brown, Jr.; California Department of Corrections and Rehabilitation
6 (CDCR) Matthew Cate; California State Prison- Corcoran (CSP-Cor) Warden Raul Lopez; and
7 Governor Arnold Schwarzenegger. Amended Complaint (AC), docket # 9, pp. 1-3. Plaintiff
8 claims that defendant Brown illegally circumvented a court order, on November 1, 2007, by
9 issuing erroneous and fraudulent information to CDCR officials to unlawfully detain plaintiff in
10 prison after his sentence had been vacated and remanded by the Sixth District Court of Appeals
11 on May 30, 2007, in Case No. HO29616. *Id.* at 3. Plaintiff also claims that defendant Cate has
12 been detaining him since May 30, 2007, without a lawful abstract of judgment from a superior
13 court setting forth his sentence [or re-sentence]. *Id.* at 3, 5. Plaintiff alleges that defendant
14 Lopez is currently housing plaintiff at CSP-Corcoran, subjecting him to punitive CDCR policies,
15 actions and decisions without a lawful abstract of judgment showing his sentence. *Id.* at 5.
16 Plaintiff's claim as to defendant Schwarzenegger is that, as governor, he oversees all state
17 agencies and is legally responsible for ensuring that state facilities and agencies comply with
18 state and federal laws. *Id.* Plaintiff claims that defendant Schwarzenegger has been aware of the
19 civil rights violations to which plaintiff has been subjected since September 6, 2009, as a result
20 of Senator Dianne Feinstein's letter to his office but has failed to take corrective measures. *Id.*
21 and Exhibit C (copy of letter dated Sept. 6, 2009, on U.S. Senate letterhead and signed by Dianne
22 Feinstein indicating that she has referred his letter regarding plaintiff's "difficulties with
23 resentencing" to Gov. Schwarzenegger's office).

24 Plaintiff claims that "[f]or 34 months and counting" he has been subjected to
25 unlawful actions that have been in reckless disregard of his civil rights. AC, p. 6. He contends
26 that defendants' actions have amounted to "premeditated criminal conspiracy, aggravated

1 assault...aggravated kidnapping...and premeditated reckless endangerment.” Id. Plaintiff states
2 that he “fears for his life,” but, other than his claim that he is being unlawfully confined, fails to
3 provide the basis for this fear. Id. Plaintiff seeks injunctive relief, without specifying that he is
4 seeking release from prison. He also asks that his personal property “unlawfully confiscated”
5 from him by unnamed CDCR officials be restored to him. Id. Confusingly, plaintiff claims he is
6 “lawfully” in the custody of Santa Clara County. Id. at 11. Plaintiff’s amended complaint will
7 be dismissed with leave to amend.

8 Federal law opens two main avenues to relief on complaints related
9 to imprisonment: a petition for habeas corpus, 28 U.S.C. 2254,
10 and a complaint under the Civil Rights Act of 1871, Rev. Stat.
11 1979, as amended, 42 U.S.C. 1983. Challenges to the validity of
12 any confinement or to particulars affecting its duration are the
13 province of habeas corpus, Preiser v. Rodriguez, 411 U.S. 475,
14 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); requests for relief
15 turning on circumstances of confinement may be presented in a §
16 1983 action.

17 Muhammad v. Close, 540 U.S.749, 750, 124 S.Ct. 1303, 1304 (2004) (per curiam).

18 To the extent that plaintiff may be seeking a release from custody and in fact is
19 challenging the validity of his confinement, which he certainly appears to be doing, plaintiff, as
20 petitioner, must proceed on a habeas application, pursuant to 28 U.S.C. § 2254, naming the
21 warden of California State Prison in Corcoran, where he is currently confined, as respondent.¹
22 To the extent that his challenge is to the sentencing or re-sentencing (or lack thereof) of a Santa
23 Clara County Superior Court, his petition should be filed in the Northern District because while
24 both the Fresno Division of the Eastern District (where plaintiff/petitioner is confined) and the
25 Northern District (where he was convicted) have jurisdiction, see Braden v. 30th Judicial Circuit
26 Court, 410 U.S. 484 (1973), any and all witnesses and evidence necessary for the resolution of

¹ “A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition. This person typically is the warden of the facility in which the petitioner is incarcerated. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.1992).” Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994) (citing Rule 2(a), 28 U.S.C. foll. § 2254).

1 petitioner's application are more readily available in Santa Clara County, within the jurisdiction
2 of the United States District Court for the Northern District. Id. at 499 n.15; 28 U.S.C.
3 § 2241(d).

4 To the extent that plaintiff wishes to proceed on an action pursuant to 42 U.S.C. §
5 1983, he must further amend his allegations to set forth specific, colorable allegations against
6 named defendants who have actually subjected him to unconstitutional conditions of
7 confinement and not simply name state officials for having allegedly illegally confined him. As
8 any such defendants would appear to be associated with CSP-Corcoran, in Kings County, should
9 plaintiff file a further amended complaint setting forth alleged violations within Kings County,
10 part of the Fresno Division of the United States District Court for the Eastern District of
11 California, see Local Rule 120(d), this court will transfer this case to the proper division,
12 pursuant to Local Rule 120(f).

13 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
14 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
15 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
16 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless
17 there is some affirmative link or connection between a defendant's actions and the claimed
18 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d
19 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
20 vague and conclusory allegations of official participation in civil rights violations are not
21 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

22 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
23 order to make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
24 complaint be complete in itself without reference to any prior pleading. This is because, as a
25 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375
26 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no

1 longer serves any function in the case. Therefore, in an amended complaint, as in an original
2 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

3 Miscellaneous Filings

4 This action was transferred with several motions pending: a motion for extension
5 of time, filed on March 5, 2010, which will be denied as moot; a motion to appoint counsel; a
6 motion for injunctive relief; and a “motion to compel defendants to discontinue unconstitutional
7 restraining of plaintiff liberty.”

8 Motion to Appoint Counsel

9 Plaintiff has requested the appointment of counsel. The United States Supreme
10 Court has ruled that district courts lack authority to require counsel to represent indigent
11 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
12 certain exceptional circumstances, the court may request the voluntary assistance of counsel
13 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
14 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court
15 does not find the required exceptional circumstances. Plaintiff’s request for the appointment of
16 counsel will therefore be denied.

17 Motion for Injunctive Relief

18 Plaintiff alleges that on July 12, 2010, he began to cough up blood, apparently for
19 no reason. Motion, p. 1. Plaintiff claims that after waiting three hours to be seen, he was told to
20 go back to his building without having been provided with adequate health care by unnamed
21 CSP-Corcoran medical staff. Id. When the same symptoms recurred the next day, plaintiff was
22 taken to the facility emergency room and finally seen after four hours by a Dr. Moon, who simply
23 told him to drink more water. Id., at 1-2.

24 On July 14, 2010, plaintiff had the same symptom and was this time seen by a
25 nurse practitioner named Boondoc, who while examining him, became argumentative without
26 providing him with any medical care. Id. at 2. On July 19, 2010, plaintiff was seen by a Dr.

1 Rim, explained his medical problems and was diagnosed with TB. Id. Plaintiff was transported
2 to San Joaquin Community Hospital that day. Id. During his seven-day stay at the hospital, after
3 a battery of tests were conducted, plaintiff was found to have been misdiagnosed and without
4 TB-related complications. Id.

5 Plaintiff then goes on to allege that he has been subjected to a campaign of
6 harassment for having contacted internal affairs about custody staff smoking in the unit area.
7 Motion, p. 2. Plaintiff alleges that he has written defendant Warden Lopez several times to tell
8 him that his staff has been smuggling contraband into the prison and subjecting plaintiff to an
9 unreasonable health risk by smoking in the inmates' housing area. Id. at 3. Plaintiff states that
10 he was approached by a Correctional Officer (C/O) Williams about having written the warden
11 and told to "remember who serve you your food." Id. When plaintiff told C/O Medina about his
12 concerns and fears, she told him that they did not like inmates who write to the warden about
13 what staff is doing. Id. When plaintiff complained about the smoking and staff tampering with
14 his food, she stated: "Now you know what we like and dislike back here." Id.

15 Plaintiff further contends that he has become a target since Williams and Medina
16 became agitated with him for writing defendant Lopez. Motion, p. 2. Plaintiff claims that during
17 his last day at the hospital on July 25, 2010, when he asked C/O Blevins not to serve him food
18 without gloves on, Blevins returned with a Sergeant Steward and both of his arms and one leg
19 were secured to the bed for four hours. Id., at 3. Plaintiff claims that he is currently being held
20 in an isolated medical cell for a condition from which he does not suffer, TB. Id. He believes he
21 became sick after having his food tampered with with bleach and other hazardous products. Id.
22 Plaintiff seeks the court's assistance, claiming to be in fear for his life. Id.

23 Preliminary Injunctive Relief Legal Standard

24 "The proper legal standard for preliminary injunctive relief requires a party to
25 demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm
26 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

1 injunction is in the public interest.” Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir.
2 2009), quoting Winter v. Natural Res. Def. Council, Inc., ___ U.S. ___, 129 S.Ct. 365, 374
3 (2008).

4 A Ninth Circuit panel has found that post-Winter, this circuit’s sliding scale
5 approach or “serious questions” test survives “when applied as part of the four-element *Winter*
6 test.” Alliance for Wild Rockies v. Cottrell, No. 09-35756, 10855, 10865 (9th Cir. July 28, 2010)
7 “In other words, ‘serious questions going to the merits,’ and a hardship balance that tips sharply
8 toward the plaintiff can support issuance of an injunction, assuming the other two elements of the
9 *Winter* test are also met.” Id.

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

14 Discussion

15 In this instance, plaintiff does not have a colorable complaint, the merits of which
16 this court could even evaluate. Nor within the underlying allegations that he did make did
17 plaintiff name any of the individuals as defendants other than defendant Lopez. In the context of
18 naming defendant Lopez, plaintiff failed to set forth the allegations that he makes within his
19 motion for preliminary injunctive relief. Plaintiff has simply provided an insufficient basis for
20 this court to issue any form of injunctive relief at this point and the motion will be denied, but
21 without prejudice to the filing of a complaint with cognizable claims and an adequately
22 supported motion for preliminary injunctive relief.

23 Motion to Compel Defendants to Discontinue Unconstitutional Restraint of 24 Liberty

25 Plaintiff’s request that he be transferred to Santa Clara County for re-sentencing
26 must be disregarded as inapposite within the pending action.

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

2 1. The original complaint is superseded by the amended complaint, filed on
3 March 24, 2010;

4 2. The amended complaint is dismissed for the reasons discussed above, with
5 leave to file an amended complaint within twenty-eight days from the date of service of this
6 order. Failure to file an amended complaint will result in a recommendation that the action be
7 dismissed;

8 3. Plaintiff's motion for an extension of time, filed on March 5, 2010 (docket #
9 5), is denied as moot;

10 4. Plaintiff's motion to appoint counsel, filed on July 8, 2010 (docket # 20) is
11 denied;

12 5. Plaintiff's motion for injunctive relief, filed on August 4, 2010 (docket # 22),
13 is denied without prejudice; and

14 6. Plaintiff's motion to compel defendants to discontinue unconstitutional
15 restraint of plaintiff's liberty, filed on August 19, 2010 (docket # 23), is denied as inapposite.

16 DATED: October 7, 2010

17 /s/ Gregory G. Hollows

18 _____
19 GREGORY G. HOLLOWES
UNITED STATES MAGISTRATE JUDGE

20 GGH:009
21 evan2453.b+