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

VIRGIL ROBERT ELBERT,

Plaintiff,

No. CIV S-11-1154 GEB EFB P

vs.

GARY SWARTHOUT, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has requested that the court appoint counsel and grant him leave to proceed in forma pauperis and an extension of time to serve defendants. Dckt. Nos. 2, 6, 7. For the reasons that follow, the court will grant plaintiff leave to proceed in forma pauperis, deny the requests for counsel and an extension of time, and dismiss the complaint with leave to file an amended complaint within 30 days.

**I. Motion 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. Motion for Appointment of Counsel**

2 District courts lack authority to require counsel to represent indigent prisoners in § 1983  
3 cases. *Mallard v. United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional  
4 circumstances, the court may request counsel voluntarily to represent such a plaintiff. 28 U.S.C.  
5 § 1915(e)(1); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900  
6 F.2d 1332, 1335-36 (9th Cir. 1990). The court finds that there are no exceptional circumstances  
7 in this case.

8 **III. Screening Order**

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

15 A district court must construe a pro se pleading “liberally” to determine if it states a  
16 claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
17 opportunity to cure them. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). While  
18 detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a cause of  
19 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct.  
20 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff  
21 must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
22 plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570).

23 A claim has facial plausibility when the plaintiff pleads factual content that allows  
24 the court to draw the reasonable inference that the defendant is liable for the  
25 misconduct alleged. The plausibility standard is not akin to a “probability  
26 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.

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

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

5 Every person who, under color of [state law] . . . subjects, or causes to be  
6 subjected, any citizen of the United States . . . to the deprivation of any rights,  
7 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 . . . .

8 42 U.S.C. § 1983. An individual defendant is not liable on a civil rights claim unless the facts  
9 establish the defendant's personal involvement in the constitutional deprivation or a causal  
10 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.  
11 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44  
12 (9th Cir. 1978)

13 The court has reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and finds it  
14 does not state a cognizable claim as currently pleaded. Plaintiff names Gary Swarouth, James  
15 Lee, R. Durfey, C. Palwick, C. Martinez, and S. Feudner as defendants and alleges:

16 All of the above officers signed and approved for me to be taped and shackled for  
17 as long as necessary to meet there [sic] agenda. On 1-27-10 I was placed in 2 pair  
18 of boxers taped to the hair and skin on my legs. Two shirts taped to the boxers  
19 and around my arms. Two full body jumpsuits taped around calf's [sic] and  
20 stomach ribs making it difficult to breath and around rib cage. Also taped around  
21 arms (one jumpsuit is put on correctly, the second is placed backwards). I was  
then shackled at the ankles and waist for 14 days. No shower. No soap. No  
brushing teeth and you can only use the rest room once a day. I was forced to eat  
and sleep this way. Shackles are not even removed to use rest room. I have  
medical conditions that increased the pain and made it difficult to use the rest  
room but officers did not care.

22 Dckt. No. 1 at 3. Plaintiff's allegations fail to show how each defendant was personally involved  
23 in the constitutional deprivations alleged. Thus, to proceed plaintiff must file an amended  
24 complaint.

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1 Any amended complaint must adhere to the following requirements:

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

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

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

14 Plaintiff may join multiple claims if they are all against a single defendant. Fed. R. Civ.  
15 P. 18(a). Unrelated claims against different defendants must be pursued in multiple lawsuits.  
16 "The controlling principle appears in Fed. R. Civ. P. 18(a): 'A party asserting a claim . . . may  
17 join, [] as independent or as alternate claims, as many claims . . . as the party has against an  
18 opposing party.' Thus multiple claims against a single party are fine, but Claim A against  
19 Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims  
20 against different defendants belong in different suits, not only to prevent the sort of morass [a  
21 multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the  
22 required filing fees-for the Prison Litigation Reform Act limits to 3 the number of frivolous suits  
23 or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. §  
24 1915(g)." *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007); *see also* Fed. R. Civ. P. 20(a)(2)  
25 (joinder of defendants not permitted unless both commonality and same transaction requirements  
26 are satisfied). Plaintiff may not change the nature of this suit by alleging new, unrelated claims

1 in an amended complaint. *George*, 507 F.3d at 607 (no “buckshot” complaints).

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

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

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

19 **IV. Motion for Extension of Time**

20 Plaintiff states that he has been unable to serve all parties due to limited law library  
21 access and resources. Dckt. No. 6. No such extension is necessary. If plaintiff submits an  
22 amended complaint stating a cognizable claim against defendants, the court will provide plaintiff  
23 with directions and forms to effect service of process and, upon plaintiff’s return of those forms  
24 and compliance with the court’s directions, will direct the U.S. Marshal to serve process  
25 pursuant to Federal Rule of Civil Procedure 4(c)(3).

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1 **V. Order**

2 Accordingly, the court hereby orders that:

3 1. Plaintiff's April 29, 2011 request to proceed in forma pauperis is granted.

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

7 3. Plaintiff's June 1, 2011 motion for appointment of counsel is denied.

8 4. Plaintiff's June 1, 2011 motion for an extension of time is denied.

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

14 DATED: June 6, 2011.

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16 EDMUND F. BRENNAN  
17 UNITED STATES MAGISTRATE JUDGE  
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