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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL TILTON,  
Plaintiff,  
v.  
EDMUND G. BROWN, et al.,  
Defendant.

No. 2:12-cv-02020 LKK DAD P

ORDER

Plaintiff is a California state prisoner, incarcerated at the La Palma Correctional Center in Eloy, Arizona. He is proceeding pro se and seeks relief pursuant to 42 U.S.C. § 1983. This action was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

**I. Filing Fee**

Plaintiff has not paid the filing fee of \$350.00 or filed an application to proceed in forma pauperis. See 28 U.S.C. §§ 1914(a) & 1915(a). Plaintiff will be granted thirty days to pay the filing fee in full or submit a properly completed application to proceed in forma pauperis. If plaintiff submits an in forma pauperis application form, plaintiff is reminded that the form includes a section that must be completed by a prison official, and the form must be accompanied by a certified copy of plaintiff's prison trust account statement for the six-month period immediately preceding the filing of this action.

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1 Plaintiff is also cautioned that should he proceed with this action by submitting the filing  
2 fee or an in forma pauperis application, the undersigned intends to recommend that this action be  
3 dismissed due to both his failure to state a cognizable claim in his complaint and improper venue.

## 4 **II. Screening Requirement**

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

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
12 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. Neitzke,  
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
16 Cir. 1989); Franklin, 745 F.2d at 1227.

17 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain  
18 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
19 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
20 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
21 However, in order to survive dismissal for failure to state a claim a complaint must contain more  
22 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
23 allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550  
24 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
25 allegations of the complaint. See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740  
26 (1976). The court must also construe the pleading in the light most favorable to the plaintiff and  
27 resolve all doubts in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

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1 **III. Plaintiff's Complaint**

2 In his complaint, plaintiff asserts that his rights under the First, Sixth and Fourteenth  
3 Amendments were violated when, in August of 2011, officials at the La Palma Correctional  
4 Center (LPCC) promulgated and implemented new procedures concerning prisoners' use of the  
5 law and recreational library. Under these new procedures, a non-priority prisoner user has only  
6 two-hours per week allotted time for law/recreational library use. (ECF No. 1, ¶ 20 at 7.)  
7 Prisoners may, however, request additional library time and if there is a vacancy, such additional  
8 time will be assigned on a first-come, first-served basis. (Id., ¶ 38 at 14.) Plaintiff alleges that the  
9 new policies result in underuse of the library. (Id., ¶ 21 at 7-8.) On September 13, 2011, plaintiff  
10 attempted to use the law library which was not fully occupied but was nonetheless denied access.  
11 (Id., ¶ 26 at 8.) On July 26, 2012, plaintiff again requested permission to use one of the vacant  
12 library terminals but was denied because his housing unit was not scheduled to use the library at  
13 that time. (Id., ¶ 42 at 15-16.)

14 Plaintiff claims that the new procedures at LPCC violate his rights to access to the courts,  
15 freedom of expression, assistance of counsel, equal protection and due process.

16 **IV. California Defendants**

17 In his complaint plaintiff has named the following California defendants: Governor  
18 Brown, Secretary Cate of the California Department of Corrections and Rehabilitation (CDCR),  
19 Chief Deputy Kernan of the CDCR and Harman, the Chief of the Contract Beds Unit for the  
20 CDCR.

21 All of these defendants are sued in both their official and individual capacities. However,  
22 under the Eleventh Amendment, defendants are immune from suit brought against them in their  
23 official capacity. See Holley v. California Dept. of Corrections, 599 F.3d 1108, 1111 (9th Cir.  
24 2010) (holding that for sovereign-immunity purposes, a suit against state officials in their official  
25 capacities is treated as a suit against the state of California). Furthermore, the state has not  
26 waived immunity under the Eleventh Amendment for claims brought against it under § 1983 in  
27 federal court. See Dittman v. California, 191 F.3d 1020, 1025-56 (9th Cir. 1999) (“T]he Supreme

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1 Court has held that § 1983 was not intended to abrogate a State’s Eleventh Amendment  
2 immunity.”).

3 As to plaintiff’s claims against the California defendants in their individual capacities,  
4 supervisory personnel are generally not liable under § 1983 for the actions of their employees  
5 under a theory of respondeat superior and, therefore, when a named defendant holds a  
6 supervisory position, the causal link between him and the claimed constitutional violation must  
7 be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v.  
8 Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations concerning the  
9 involvement of official personnel in civil rights violations are not sufficient. See Ivey v. Board of  
10 Regents, 673 F.2d 266, 268 (9th Cir. 1982). Here, plaintiff’s claims against defendants Brown,  
11 Cate, Kernan and Harman are based solely on their supervisory positions. However, there is no  
12 affirmative link or connection between each defendant’s actions and the claimed constitutional  
13 deprivations. See Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th  
14 Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Plaintiff has not alleged that  
15 any of the defendants were personally involved in the promulgation or implementation of the  
16 policies at LPCC, nor has he alleged that they were involved in denying plaintiff access to the law  
17 or recreational library. Therefore, plaintiff has failed to state a cognizable claim against these  
18 defendants.

#### 19 **IV. Improper Venue**

20 Venue for federal claims is proper in the district in which (1) any defendant resides, if all  
21 of the defendants reside in the same state, (2) the district in which a substantial part of the events  
22 or omissions giving rise to the claim occurred, or a substantial part of property that is the subject  
23 of the action is situated, or (3) a judicial district in which any defendant may be found, if there is  
24 no district in which the action may otherwise be brought. 28 U.S.C. § 1391(b). Here, the actions  
25 about which plaintiff complains occurred in Arizona where the procedures were promulgated and  
26 where plaintiff was allegedly denied use of the prison library. See Marroquin v. Cate, No. C 11-  
27 4535 SBA (PR), 2013 WL 451405, at \*4 (N.D. Cal. Feb. 5, 2013) (concluding that venue for  
28 plaintiff’s claims concerning reasonable accommodations, medical treatment and access to the

1 courts at the La Palma Correctional Center is in Arizona); Ah Sing v. Dept. of Public Safety, No.  
2 1:12-cv-00599 LEK/BMK, 2012 WL 5880918 (D. Hawaii Nov. 21, 2012) (concluding that  
3 transfer of the case from Hawaii to Arizona was proper because Arizona is where plaintiff is  
4 incarcerated, where his claims allegedly occurred, and that any contractual agreement between  
5 CCA and the State of Hawaii is not determinative); Davis v. State of Hawaii, Civ. No. 08-00434  
6 JMS-BMK, 2009 WL 1227841, at \*4 (D. Hawaii May 4, 2009) (concluding that venue was  
7 proper in Arizona where the Hawaii state prisoner/plaintiff was incarcerated and where he  
8 allegedly was prevented from practicing his Native Hawaiian religion); See v. Corrections  
9 Corporation of America (CCA), 525 F. Supp. 2d 1238, 1242 (D. Hawaii 2007) (rejecting  
10 plaintiff's argument that venue was proper in Hawaii based on the contract between CCA and the  
11 Hawaii Department of Public Safety (DPS) and the latter's responsibility to monitor the treatment  
12 of Hawaii inmates, concluding that venue was proper in Mississippi where plaintiff allegedly  
13 sustained injuries when he was attacked by other inmates).

14 Therefore, should plaintiff seek to pursue his claims against the named Arizona  
15 defendants (Warden MacDonald, Associate Warden Stansel, Principal Carr and Vice-Principals  
16 Prince and Del Sordi), he must file a new action in the U.S. District Court for the District of  
17 Arizona.

## 18 **V. Other Matters**

19 Plaintiff has filed a request for the appointment of counsel. The United States Supreme  
20 Court has ruled that district courts lack authority to require counsel to represent indigent prisoners  
21 in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain  
22 exceptional circumstances, the district court may request the voluntary assistance of counsel  
23 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);  
24 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). The test for exceptional  
25 circumstances requires the court to evaluate the plaintiff's likelihood of success on the merits and  
26 the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal  
27 issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v.  
28 Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common to most prisoners, such as lack

1 of legal education and limited law library access, do not establish exceptional circumstances that  
2 would warrant a request for voluntary assistance of counsel. In the present case, the court does  
3 not find the required exceptional circumstances, in particular, the likelihood of success on the  
4 merits. Therefore, plaintiff's motion for appointment of counsel will be denied.

5 Plaintiff has also filed two motions to amend and expand his complaint. In his first such  
6 motion, plaintiff seeks to correct the spelling of defendant Del Sorte's name<sup>1</sup>, to add additional  
7 defendants who are employed at La Palma Correctional Center, and to provide additional  
8 allegations concerning his attempts to use the recreational and law library at LPCC. (ECF No. 8.)  
9 In his second motion, plaintiff seeks to substitute defendant CDCR Director Cate with his  
10 successor Jeffery Beard, to include additional allegations concerning the rules for law library  
11 access at LPCC, and a fourth claim for relief based on his First Amendment right to petition the  
12 government for redress and his right to freedom of expression. (ECF No. 9.)

13 Plaintiff's motions will be denied without prejudice as unnecessary. Should plaintiff elect  
14 to pursue this action by submitting the filing fee or in forma pauperis application, plaintiff may  
15 file an amended complaint without leave of court. See Rule 15(a) of the Federal Rules of Civil  
16 Procedure (a party may amend the party's pleading once as a matter of course at any time before a  
17 responsive pleading is served).

18 If he elects to file an amended complaint in this court despite the court's indication that it  
19 would likely be subject to dismissal, plaintiff is also informed that the court cannot refer to a prior  
20 pleading in order to make plaintiff's amended complaint complete. Local Rule 220 requires that  
21 an amended complaint be complete in itself without reference to any prior pleading. This is  
22 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
23 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
24 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
25 original complaint, each claim and the involvement of each defendant must be sufficiently  
26 alleged.

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28 <sup>1</sup> The correct spelling for defendant is "Del Sordi." (ECF No. 8, ¶ 2 at 1.)

1           Lastly, a request to file an amicus brief has been filed by inmate Earl Cannedy who is also  
2 incarcerated at the LPCC. (ECF No. 7.) Mr. Cannedy provides an affidavit concerning his  
3 attempt to access the law library on April 17, 2012, and his inmate grievance. In light of the  
4 court's finding that venue is not proper in this court with respect to plaintiff's claims concerning  
5 the new procedures for law and recreational library use at LPCC in Arizona, this request will be  
6 denied. In addition, it appears that any amicus brief filed by inmate Cannedy would likely only  
7 duplicate the factual information plaintiff has already provided in his complaint. See Gabriel  
8 Technologies Corp. v. Qualocomm Inc., Civil No. 08CV1992 AJB (MDD), 2012 WL 849167 at  
9 \*4 (S.D. Cal. Mar. 13, 2012) ("District courts have discretion to accept amicus briefs from non-  
10 parties concerning legal issues that have possible ramifications beyond the parties directly  
11 involved in the case or if the amicus has unique information or perspective that can help the court  
12 . . . . An amicus brief is meant to assist the court and not merely extend the length of the litigant's  
13 brief.") (internal quotation marks and citation omitted).

#### 14 **VI. Conclusion**

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

- 16           1. Should plaintiff elect to proceed with this action in this court, he shall submit, within  
17 thirty days from the date of this order, either the \$350.00 filing fee or a properly completed  
18 application to proceed in forma pauperis on the form provided with this order;
- 19           2. Plaintiff's August 1, 2012 motion for the appointment of counsel (ECF No. 2) is  
20 denied;
- 21           3. Plaintiff's November 1, 2012 and March 20, 2013 motions to amend and expand his  
22 complaint (ECF Nos. 8 & 9) are denied as unnecessary;
- 23           4. Should plaintiff elect to proceed with this action in this court, within thirty days from  
24 the date of service of this order, he shall file an amended complaint that complies with the  
25 requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of  
26 Practice; the amended complaint must bear the docket number assigned this case and must be  
27 labeled "Amended Complaint";

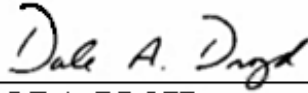
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5. Plaintiff's failure to comply with this order will result in a recommendation that this action be dismissed without prejudice; and

6. The Clerk of the Court is directed to send plaintiff an Application to Proceed In Forma Pauperis By a State Prisoner, and a copy of the court's form complaint for a § 1983 action.

Dated: July 18, 2013



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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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